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Implied Antitrust Repeals: Principles for Analysis

Robert Simon Balter*
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I. Introduction

Recently, federal courts across the nation have been confronted with the contention that telephone companies are immune from the

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operation of the federal antitrust laws.[1] This contention raises the much larger issue of the proper accommodation of antitrust and regulatory statutes, an issue infamous for the complex analytical difficulties it has caused in the courts.

The argument presented by the telephone companies is essentially that regulation under the Communications Act of 1934[2] is inherently and fundamentally inconsistent with the application of the antitrust laws to the pervasively regulated telecommunications industry; therefore, the argument continues, the antitrust laws have been impliedly repealed.[3] These claims have caused substantial confusion in this entire area.[4] Many advocates believe that the cases are hopelessly irreconcilable.[5] Suggestions for reform abound.[6] There are proposals for strict tests[7] and for admittedly somewhat looser

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1. *See, e.g.,* Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716 (9th Cir. 1981), *rev'g,* 435 F. Supp. 207 (C.D. Cal. 1977); DASA Corp. v. General Tel. Co., 664 F.2d 716 (9th Cir. 1981), *rev'g,* 1977-2 Trade Cas. (CCH) ¶ 61,610 (C.D. Cal. 1977); Northeastern Tel. Co. v. AT&T, 651 F.2d 76 (2d Cir. 1981); Sound, Inc. v. AT&T, 631 F.2d 1324 (8th Cir. 1980); Mid-Texas Communications Sys., Inc. v. AT&T, 615 F.2d 1372 (5th Cir. 1980), *cert. denied,* 449 U.S. 912 (1980): Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979), *rev'g,* 446 F. Supp. 1090 (D.N.J. 1978); *In re* AT&T v. United States, No. 78-2050 (D.C. Cir. Oct. 31, 1978), *cert. denied,* 439 U.S. 1090 (1979); Industrial Communications Sys. v. Pacific Tel. & Tel. Co., 505 F.2d 152 (9th Cir. 1974); Jarvis, Inc. v. AT&T, 481 F. Supp. 120 (D.D.C. 1978); Interconnect Planning Corp. v. AT&T, 465 F. Supp. 811 (S.D.N.Y. 1978); MCI Communications Corp. v. AT&T, 462 F. Supp. 1072 (N.D. Ill. 1978), *cert denied,* No. 78-7457 (7th Cir. Nov. 30, 1978); Western Elec. Co. v. Milgo Elec. Corp., 1978-1 Trade Cas. (CCH) ¶ 61,960 (S.D. Fla. 1976), *appeal dismissed,* 568 F.2d 1203 (5th Cir. 1978), *cert. denied,* 439 U.S. 895 (1978); United States v. AT&T, 427 F. Supp. 57 (D.D.C. 1976), *cert. denied,* 429 U.S. 1071 (1977), *cert. denied,* 434 U.S. 996 (1977), *aff'd on rehearing,* 461 F. Supp. 1314 (D.C. 1978), *mandamus denied sub nom. In re* AT&T, No. 78-2050 (D.C. Cir., Oct. 31, 1978); Chastain v. AT&T, 401 F. Supp. 151 (D.D.C. 1975); People's Tel. Coop. v. Southwestern Bell Tel. Co., 399 F. Supp. 561 (E.D. Tex. 1975); Macom Prod. Corp. v. AT&T, 359 F. Supp. 973 (C.D. Cal. 1973); International Tel.& Tel. v. General Telephone & Electric Corp., 351 F. Supp. 1153 (D. Haw. 1972), *rev'd on other grounds,* 518 F.2d 913 (9th Cir. 1975), *aff'd on rehearing,* 449 F. Supp. 1158 (D. Haw. 1978).

2. Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-155 (1976)).

3. *See* IT&T v. General Tel. & Elec. Co., 449 F. Supp. 1158, 1166-67 (D. Haw. 1978); Phonetele, Inc. v. AT&T, 435 F. Supp. 207, 209 (C.D. Cal. 1977), *rev'd,* 664 F.2d 716 (9th Cir. 1981); DASA Corp. v. General Tel. Co., 1977-2 Trade Cas. (CCH) ¶ 61, 610 (C.D. Cal. 1977), *rev'd,* 664 F.2d 716 (9th Cir. 1981). *See generally* Comment, *The Application of Antitrust Law to Telecommunications,* 69 CALIF. L. REV. 497 (1981).

4. *Compare* Sound, Inc. v. AT&T, 631 F.2d 1324 (8th Cir. 1980), *aff'g* 1979-2 Trade Cas. (CCH) ¶ 62,974 (S.D. Iowa 1979) *with* National Gerimedical Hosp. v. Blue Cross, 628 F.2d 1950 (8th Cir. 1980), *aff'g* 479 F. Supp. 1012 (W.D. Mo. 1979), *rev'd,* 449 U.S. 1123 (1981).

5. *See, e.g.,* Comment, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine,* 57 TEX. L. REV. 751 (1979) [hereinafter cited as 57 TEX. L. REV.]; Comment, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity,* 85 YALE L.J. 254, 257-58 (1975) [hereinafter cited as 85 YALE L.J.].

6. *See* note 5 *supra*; Comment, *Competition in the Telephone Equipment Industry: Beyond Telerent,* 86 YALE L.J. 538 (1977).

7. It appears that the author of *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity, supra* note 5, believes that a new formulation for decision-making with respect to implied immunity is necessitated because of the pervasive regulation of the industry. 85 YALE L.J., *supra* note 5, at 257. This test has been severely criticized. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 223b at 137-38 (1978); Handler, *Regulation Versus Competition,* 43

formulations.[8] Undeniably, some courts have been led astray.[9] No consistent rationale has yet emerged.

This article analyzes the arguments involved. After providing a cohesive framework for analyzing the issue of implied repeal, the authors conclude that implied antitrust immunity for telephone companies is generally inappropriate.[10] Reformulation of present law is

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ANTITRUST L.J. 277, 288 (1974). *Accord* MCI Communications Corp. v. AT&T, 462 F. Supp. 1072 (N.D. Ill. 1978). *See also* note 258 *infra;* note 162 *infra.*

The author also believes that the case law is hopelessly irreconcilable. 85 YALE L.J. *supra* note 5, at 257-58. The authors of this article simply do not share that belief. *See* notes 37-153 and accompanying text *infra.* Because of this perceived confusion and the difficulty of reconciling the cases, a strict test was offered to assist courts troubled by the concept of implied immunity in the telecommunications field. The authors of this article believe that the strict test is unnecessary, ill-advised, and misleading.

The "strict test" posits five factors that, if present, should result in implied immunity. 85 YALE L.J., *supra* note 5, at 257-58. The factors are as follows: (1) the conduct challenged in the antitrust complaint, as well as rates, entry, and investment in the market should be continually subject to the regulatory agency's authority; (2) the agency should have the power to grant the relief sought by the plaintiff; (3) the agency should consider the benefits of competition in making its decision; (4) agency expertise should be particularly useful in making a determination; and (5) the antitrust suit should involve important policy questions. *Id.* at 258.

Essentially the strict test is a factor-counting approach. It has been adopted by some courts. *See, e.g.,* Phonetele, Inc. v. AT&T, 435 F. Supp. 207 [C.D. Cal: 1977), *rev'd* 664 F.2d 716 (9th Cir. 1981). The factor-counting approaches are inherently misleading because they omit the *ratio decidendi* of the cases. *See* note 205 *infra.*

8. *A Critique and Proposal for Reform of the Implied Immunity Doctrine, supra* note 5, also contends that a new approach must be taken for decision-making when the question of implied antitrust immunity arises. The author states, "In its present form the doctrine is a collection of unconnected legal tests, inconsistently applied, frequently irrelevant, and quite unpredictable." 57 TEX. L. REV., *supra* note 5, at 756. We do not share this view. *See* text accompanying notes 37-153 *infra*. Assuming irreconcilability of the case law, the author of *A Critique and Proposal for Reform of the Implied Immunity Doctrine* endorses reformation of the law and proposes a complete set of factors to assist confused jurists. 57 TEX. L. REV., *supra* note 5 *passim.* Factors relevant to conflict determination according to the article are as follows: (1) presumption against implied immunity, *id.* at 67; (2) agency regulation of the challenged conduct, *id.* at 767-70; (3) the "precise ingredient" test, *id.* at 770; (4) agency authorization, approval or sanction, *id.* at 770-71; (5) continuing agency supervision, *id.* at 771; (6) agency position on the issue of its authority to regulate, *id.* at 771-72; and (7) the nature of the relief sought in the complaint, *id.* at 772-73.

Another eight factors are supposedly relevant for conflict resolution: (1) statutory authorization of the challenged conduct, *id.* at 773-74; (2) congressional failure to extend express immunity, *id.* at 774-75; (3) pervasive regulation, *id.* at 775-76; (4) necessity of implied immunity, *id.* at 776-77; (5) agency authority to enforce the antitrust laws, *id.* at 777-78; (6) agency authority to consider competitive effects, *id.* at 778-80; (7) agency authority to grant antitrust immunity, *id.* at 780-81; (8) existence of agency expertise, *id.* at 871-82.

Such an approach is obviously awkward. Furthermore, it focuses on neither of the two crucial aspects of the decision: irreconcilability and congressional intent.

9. *Compare* Phonetele, Inc. v. AT&T, 435 F. Supp. 207 (C.D. Cal. 1977) *with* Northeastern Tel. Co. v. AT&T, 477 F. Supp. 251 (D. Conn. 1978); Essential Communications Sys., Inc. v. AT&T, 446 F. Supp. 1090 (D.N.J. 1978) *with* Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979); Macom Prod. Corp. v. AT&T, 359 F. Supp. 973 (C.D. Cal. 1973)*with* DASA Corp. v. General Tel. Co., 1977-2 TRADE CAS. (CCH) ¶ 61,610 (C.D. Cal. 1977); IT&T v. GT&E, 351 F. Supp. 1153 (D. Haw. 1972) and 449 F. Supp. 1158 (D. Hawaii 1978) *with* Western Elec. Corp. v. Milgo Elec. Corp., 1978-1 TRADE CAS. (CCH) ¶ 61, 960 (S.D. Fla. 1976).

10. *See generally* text accompanying notes 221-315 *infra*. The exceptions are well stated in United States v. AT&T, 427 F. Supp. 57, 59 (D.D.C. 1976). A narrow express antitrust immunity for FCC approved mergers of operating telephone companies is codified at 47 U.S.C. § 221(a) (1976).

neither necessary nor desirable[11] and the cases simply are not irreconcilable.[12] Rather, the law of implied repeal, when properly applied, satisfactorily resolves the questions presented. The fundamental problem in the accommodation of antitrust and regulatory law is the articulation of a framework for analyzing the issues. Such a framework has not been articulated in past antitrust cases, but is established by the holdings of the Supreme Court in the area of implied repeal generally.

II. A Framework for Analysis

Whether the antitrust laws apply is solely a matter of statutory construction.[13] It is *not* a matter of the jurisdiction of federal courts.[14] Ultimately, the issue is always one of congressional intent.[15] The express intentions of Congress are embodied in the antitrust laws[16] and in statutes expressly repealing the antitrust laws.[17]

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11. *See generally* notes 7 and 8 *supra*.

12. The Supreme Court cases are discussed at notes 37-153 and accompanying text *infra*.

13. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 352 (1963); United States v. Borden Co., 308 U.S. 188, 198-99 (1939); Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114, 1117 n.8 (3d Cir. 1979); Mt. Hood Stages, Inc. v. Greyhound Corp. 555 F.2d 687, 691 (9th Cir. 1977), *cert. denied in part,* 434 U.S. 1008, *rev'd*, 437 U.S. 322 (1978).

14. Bell v. Hood, 327 U.S. 678 (1946). *See also* Montana-Dakota Utilities Co. v. Northwest Public Service Co., 341 U.S. 246 (1951); The Fair v. Kohler Die Specialty Co., 228 U.S. 22 (1913); Sound, Inc. v. AT&T, 631 F.2d 1324, 1324 n.1 (8th Cir. 1980). An example of the confusion in this regard is Yellow Forwarding Co. v. Atlantic Container Line, 668 F.2d 350, 354 (8th Cir. 1981).

15. National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378, 389 (1981); Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716, 726 (9th Cir. 1981); Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 691 (9th Cir. 1977); IT&T v. GT&E, 449 F. Supp. 1159, 1165 (D. Haw. 1978).

16. 15 U.S.C. §§1-30 (1976 & Supp. 1979).
Section 1 provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contact or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 provides as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars, if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

17. Illustrative statutes expressly repealing antitrust laws include the following: (1) Immunizing mergers, consolidations and acquisitions: Bank Merger Act of 1966, § (1)(a), 12 U.S.C. § 1828(c) (1976); Interstate Commerce Act § 5(2)(a), (11), 49 U.S.C. § 408, (11) (1970); Federal Aviation Act of 1958, § 408, 49 U.S.C. § 1378 (1970); *see also* Clayton Act § 7, 15 U.S.C. § 18 (1976) (exempts from the antitrust laws mergers or acquisitions duly consummated pursuant to authority given by the FCC, ICC, SEC, CAB, FMB and Secretary of Agriculture). (2) Immunizing rate agreements: Reed-Bullwinkle Amendments § 208(a), 49 U.S.C. § 10706 (1976 & Supp. 1979) (providing ICC-approved agreements between carriers relating to rates,

Clearly Congress sometimes knows how to grant antitrust immunity without ambiguity.

Congress, however, is not always unambiguous. As the Supreme Court in *Hughes Tool Co. v. Trans World Airlines, Inc.*[18] noted, "[A] statutory scheme which does not create a total exception from the antitrust laws may, nonetheless, in particular and discrete instances, by implication grant immunity from an antitrust claim."[19]

Thus arises the question of implied repeal and what has been called implied antitrust immunity. Implied antitrust immunity occurs *only* because of an implied repeal of the antitrust laws by some later regulatory statute.[20] Such repeal is generally highly disfavored.[21] Implied repeals, however, are by no means confined to situations involving antitrust and regulatory statutes. An implied repeal question arises whenever two or more statutes apply to any single occurrence.[22] Ordinarily, as the Court stated in *United States v. Bor-*

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fares, etc., with antitrust exemption on the making of such agreements); Shipping Act of 1916, §§ 14(b), 15, 46 U.S.C. §§ 813a, 814 (1970) (agreements between carriers or between parties subject to Act including rates, fares, etc., lawful under Act are exempt from antitrust laws); Federal Aviation Act of 1958, §§ 412, 414, 49 U.S.C: §§ 1382, 1384 (1970). (3) Immunizing pooling and other cooperative activities: Small Business Act §§ 7, 9, 11, 15 U.S.C. §§ 636, 638, 640 (1976) (exempting, inter alia, certain voluntary agreements and programs in furtherance of the Act's objectives); Webb-Pomerene Act §§ 1-5, 15 U.S.C. §§ 61-65 (1976) (granting limited exception for cooperative foreign trade); Fisherman's Collective Marketing Act §§ 1-2, U.S.C. §§ 521-522 (1976) (exempting independent fishermen's organizations from the antitrust laws); Clayton Act § 6, 15 U.S.C. § 7 (1976) (existence and operation of labor, agricultural, and horticultural organizations exempt).

18. 409 U.S. 363 (1973).

19. *Id.* at 385 n.14.

20. *See* Morton v. Mancari, 417 U.S. 538, 550 (1974). For a discussion of this issue *see* notes 271-309 and accompanying text *infra*.

21. *See, e.g.,* Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963); Silver v. N.Y.S.E., 373 U.S. 341, 357 (1963); United States v. RCA, 358 U.S. 334 (1959); Georgia v. Pennsylvania R.R., 324 U.S. 439, 456 (1945); United States v. Borden Co., 308 U.S. 188, 198 (1939).

In United States v. Southeastern Underwriters Assoc., 322 U.S. 533 (1944) the court said of the Sherman Act, "Language more comprehensive is difficult to conceive. On its face, it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize, commercial intercourse among the states." *Id.* at 553. This language was quoted with approval in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398-99 (1978). *See also* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) ("The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of forbidden practices by whomever they may be perpetrated"). This policy statement was recently quoted with approval in Pfizer, Inc. v. India, 434 U.S. 308, 312 (1978).

22. This article is concerned with implied repeal of antitrust laws by subsequent *regulatory* legislation. The United States Supreme Court recently indicated, however, that the principles articulated in this article also apply to implied antitrust repeal by subsequent *labor* legislation. Kaiser Steel Corp. v. Mullins, 42 U.S.L.W. 129, 133 (U.S. Jan. 13, 1982) (No. 18-1345). *See generally* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Granddad Bread, Inc. v. Continental Baking Co., 612 F.2d 1105 (9th Cir. 1980); Larry v. Mucko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 609 F.2d 1368 (3d Cir. 1979); Consolidated Exp., Inc. v. New York Shipping Ass'n, Inc., 602 F.2d 494 (3d Cir. 1979), *petition for cert. filed,* Nos. 78-1905 and 79-221 (1979); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979).

Antitrust laws and patent laws must also be accommodated. Since patent laws were enacted before antitrust laws, the obverse of the implied repeal situation is presented. *See gener-*

den, "when there are two acts upon the same subject, the rule is to give effect to both if possible."[23]

An implied repeal of one statute by a later statute occurs when there is an affirmative showing of legislative intention to repeal the earlier statute in the enactment of the later statute.[24] The Court has further stated that "in the absence of some affirmative showing of an intention to repeal, the *only* permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable."[25]

Nor has the Court left us adrift in determining when statutes are and are not to be considered "irreconcilable." In addressing that very subject in *Radzanower v. Touche Ross & Co.*,[26] the Court quite plainly set minimal bounds: "It is not enough to show that the two statutes produce differing results when applied to the same factual situation for that no more than states the problem."[27]

Settled law of statutory construction thus mandates a straightforward two-pronged analysis. The first question is whether an affirmative showing of legislative intention to repeal can be made. If not, the question is simply whether the statutes are irreconcilable—whether the statutes produce differing results. If no affirmative intention to repeal exists and the statutes do not at least produce differing results, then "the problem disappears entirely,"[28] and implied repeal is simply impermissible.

Two types of distinctions must be clarified before the present state of law in this area can be appreciated. First is the distinction between primary jurisdiction and implied antitrust immunity. Second are distinctions among the regulatory schemes themselves.

Primary jurisdiction and implied antitrust immunity are fundamentally different methods for accommodating the enforcement of antitrust laws with regulatory obligations.[29] Simply stated, implied antitrust immunity determines *who* decides while primary jurisdic-

ally SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981); United States v. Westinghouse Elec. Corp., 648 F.2d 642 (9th Cir. 1981).

23. United States v. Borden, 308 U.S. 188, 198 (1939).

24. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 550 (1974).

25. *Id.* (emphasis added).

26. 426 U.S. 148 (1976).

27. *Id.* at 155.

28. Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 308 (1973).

29. The doctrine of primary jurisdiction—sometimes referred to as primary decision, exclusive primary jurisdiction, preliminary resort, or prior resort—does not govern judicial review of administrative action. Rather, it governs the determination of whether the court or the agency should make the initial determination. The doctrine only controls *initial* determination, not final determination. Often overlooked is the concept that agency jurisdiction may only lay the groundwork for a later judicial determination of the critical questions. K. DAVIS, ADMINISTRATIVE LAW TEXT § 19.01 (1972) [hereinafter cited as K. DAVIS, TEXT]. *See also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, SUPPLEMENTARY ADMINISTRATIVE LAW TREATISE § 19.01 (1976) [hereinafter cited as K. DAVIS, TREATISE].

tion determines only who decides *first*.[30] Over the years, the courts—and the Supreme Court in particular—have sometimes used similar labels to refer to these two very different doctrines. Implied antitrust immunity is sometimes referred to as exclusive jurisdiction or exclusive agency jurisdiction, while the primary jurisdiction concept is referred to as exclusive preliminary jurisdiction.[31] The loose application of these labels and the similarity of the factual contexts in which the issues arise has facilitated misunderstanding and confusion.[32]

When the doctrine of primary jurisdiction applies, it operates as a reference to a special master under Rule 53 of the Federal Rules of Civil Procedure.[33] The master becomes familiar with the facts and intricacies and reports to the court. In a primary jurisdictional context, the master is a federal agency charged with expertise in discharging its own regulatory obligations. After completing an investigation, the agency reports to the court, usually in the form of a published decision.[34] The trial before the court then proceeds and includes further examination of the challenged conduct under the antitrust laws.[35] By contrast, when antitrust immunity is invoked, the challenged conduct is not examined by either the court or the agency under any laws. Independent agency activity in the matter may or may not be stirred.

Certain Supreme Court decisions in this area are often urged in support of implied antitrust immunity although they actually address only primary jurisdiction. The standards for a primary jurisdictional reference were not, at the outset, clearly distinguished from the standards for implied repeal. Over the years, with little direct conflict,[36] the Court has developed criteria for each and the standards are clearly separate. A review of the Supreme Court cases illustrates the development of the now clearly distinct standards.

III. The Supreme Court Cases

The seminal case discussing implied repeal by reason of a subsequent regulatory act is *Texas & Pacific Railway Co. v. Abilene Cot-*

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30. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353 (1963).
31. United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 485 (1932).
32. *See generally* K. DAVIS, TEXT, *supra* note 29; K. DAVIS, TRESTISE, *supra* note 29.
33. FED. R. CIV. P. 53.
34. *See, e.g.,* Carterfone, 13 FCC 2d 420, *reh'g denied*, 14 FCC 2d 571 (1968); AT&T (Dataphone), 62 FCC 2d 774 (1977).
35. On occasion, application of the primary jurisdiction doctrine has not resulted in subsequent judicial determination. "[T]he practical effect of applying the doctrine of primary jurisdiction has sometimes been to preclude such enforcement [of antitrust policy] entirely if the agency has the power to approve the challenged activities, *see* United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408. . . ." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353-54 (1963).
36. *See* notes 37-153 and accompanying text *infra*.

ton Oil Co.,[37] a case that did not concern the antitrust laws. Rather, a shipper alleged that rates charged by a carrier were unreasonably high.[38] The Court reasoned that the Interstate Commerce Act was enacted to prohibit and redress the wrongs perpetuated by unjust discrimination and undue preferences.[39] The means Congress chose to accomplish these purposes was the establishment of reasonable rates uniformly applied to all.[40] Thus, the *Abilene* Court concluded, "There is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibition against preferences and discrimination."[41] The Court further concluded that a shipper's suit, if successful, would allow the shipper to "receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced."[42]

Abilene thus created a rule concerning suits *by customers.* Even this rule, however, was based on a carrier's conflicting *duty* under another law. Repeal was therefore based on irreconcilability. At this early juncture, there was no established distinction between primary jurisdiction and implied antitrust repeal.[43] Extensive language in the *ratio decidendi* of the Court could be understood to address primary jurisdiction, not implied repeal.[44]

It is commonly believed that implied repeal by reason of regulation was not applied to antitrust law until 1922. Presumably, in *Keogh v. Chicago & Northwestern Railway Co.,*[45] the Court inferred a repeal of the Sherman Act. This is fiction. *Keogh,* like *Abilene,* was an action brought by a shipper against a carrier for allegedly illegal overcharges. In *Keogh,* the overcharges were allegedly the product of a conspiracy to restrain trade.[46] The sole issue was "whether there is a cause of action under section 7 of the antitrust act."[47] The Court initially noted a Commission finding that "all rates fixed were reasonable and nondiscriminatory."[48] Nevertheless, the Court held,

37. 204 U.S. 426 (1907).
38. *Id.* at 430.
39. *Id.* at 439.
40. The Court observed,

> And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers [of] the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law.

Id.

41. *Id.* at 440.
42. *Id.*
43. *See* notes 29-32 and accompanying text *supra*.
44. *See* 204 U.S. at 440-41.
45. 260 U.S. 156 (1922).
46. *Id.* at 159-60.
47. *Id.* at 161.
48. *Id.*

"The fact that these [rates] had been approved by the Commission would not, it seems, bar proceedings by the government."[49] Under the statute, the Government could still seek redress by criminal proceedings,[50] injunction,[51] or forfeiture.[52] Thus, the Interstate Commerce Act Amendments could not have impliedly repealed sections 1 or 2 of the Sherman Act, as is commonly, though mistakenly, believed.

Keogh did not address antitrust law generally. Rather, it addressed the private injury requirement of then section 7 of the Sherman Act, now section 4 of the Clayton Act. The *Keogh* Court's rationale[53] therefore does not require implied *repeal* of the antitrust laws at all. The case simply held that a customer of a carrier is not injured within the meaning of the private injury requirement of the private antitrust suit by paying rates expressly approved as reasonable and non-discriminatory by the Interstate Commerce Commission (ICC). Thus, *Keogh* is solely a judicial interpretation of the private injury requirement. Recently, the Supreme Court has specifically made this point.[54]

Terminal Warehouse Co. v. Pennsylvania Railroad Co.[55] is the major source of doctrinal confusion in this area of antitrust law. This case was impliedly overruled or, at the very least, limited to its facts by *Carnation Co. v. Pacific Westbound Conference,*[56] *United States v. Philadelphia National Bank (PNB),*[57] and *Georgia v. Pennsylvania Railroad Co.*[58] *Terminal Warehouse* abandoned *Keogh's* plain construction of the private injury requirement of section 7 of the Sherman Act. Thus, *Keogh* is now simply "a warning of the practical inconvenience" of allowing remedies under both the regu-

49. *Id.* at 161-62 (emphasis added).
50. 15 U.S.C. § 3 (1976).
51. 15 U.S.C. § 4 (1976).
52. 15 U.S.C. § 6 (1976).
53. Section 7 of the Antitrust Act gives a right of action to one who has been injured in his business or property. Injury implies violation of a legal right. The legal rights of *shipper as against carrier in respect to a rate* are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier (citation omitted). This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under § 7 of the Antitrust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under § 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened and the several juries and courts gave to each the same measure of relief. Compare *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440."

260 U.S. at 162 (emphasis added).
54. *See* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 243 (1980).
55. 297 U.S. 500 (1936).
56. 383 U.S. 213 (1966).
57. 374 U.S. 321 (1963).
58. 324 U.S. 439 (1945).

latory act and the antitrust laws.[59]

Another confusing aspect of *Terminal Warehouse* is its interpretation of *United States Navigation Co., Inc. v. Cunard Steamship Co.*[60] as holding "that the plaintiff must seek redress by application to the Shipping Board."[61] In *United States Navigation,* the United States Navigation Company sought to enjoin an alleged conspiracy under the Sherman Act. United States Navigation argued that Cunard's joint exclusive patronage contracts, under which shippers were required to ship exclusively with Cunard, were in violation of the antitrust laws.[62] The Supreme Court upheld the district court's dismissal of the United States Navigation Company's complaint principally on the ground that the matter was within the exclusive jurisdiction of the United States Shipping Board.[63] The *Terminal Warehouse* Court concluded, "Certain then it is that the antitrust laws are inapplicable in all their apparent breadth to carriers by rail or water."[64] This holding is plainly not the law.[65] The judicial glosses placed on *United States Navigation* and *Keogh* by the *Terminal Warehouse* Court have been authoritatively rejected,[66] and the *ratio decidendi* of *Terminal Warehouse* has been thoroughly discredited. For example, the *Terminal Warehouse* Court reasoned that while the antitrust laws have provided for injunctive relief, "Even so, the right to sue, however explicit on its face, was held to have been partially superseded in respect of private suitors by adoption of the Shipping Act, which as to transactions within its range gave the only remedies available."[67] The *Terminal Warehouse* Court's reliance on this mistaken understanding of *United States Navigation* is fatal to its reasoning. Because *Carnation* and *PNB* are later expressions of the Court, the earlier holding in *Terminal Warehouse* is *pro tanto* overruled[68] and is simply an irrelevant piece of history.

Three years after *Terminal Warehouse,* the Supreme Court re-

59. 297 U.S. at 512.

60. 284 U.S. 474 (1932).

61. 297 U.S. at 513.

62. 284 U.S. at 478-79.

63. *Id.* It is unnecessary to discuss the rationale of this case in detail because the Supreme Court has expressly stated that *United States Navigation* involves only primary jurisdiction as opposed to any implied repeal of antitrust laws. Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 220-21 (1966). In United States v. Philadelphia Nat'l Bank, the Court pointed out "the practical effect of applying the doctrine of primary jurisdiction has sometimes been to preclude such enforcement [of antitrust policy] entirely if the agency has the power to approve the challenged activities, see United States Navigation, 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408. . . ." 374 U.S. at 353-54.

64. 297 U.S. at 514.

65. *See, e.g.,* Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 456 (1945).

66. *Carnation,* 383 U.S. at 220-21; *PNB,* 374 U.S. at 354; United States v. RCA, 358 U.S. 334, 347-48 (1959).

67. 297 U.S. at 513.

68. *See, e.g.,* Sunray Oil Co. v. Commissioner of Internal Revenue, 147 F.2d 962, 964 (10th Cir.), *cert. denied,* 325 U.S. 861 (1945).

turned to the proper analysis of the implied repeal issue in *United States v. Borden Co.*[69] The Supreme Court found erroneous a lower court's ruling that "the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of § 1 of the Sherman Act with respect to the marketing of agricultural commodities."[70] This case does not discuss primary jurisdiction. Nor was there any discussion of the prior *Abilene, Keogh, United States Navigation,* or *Terminal Warehouse* cases. Instead, speaking solely in the language of implied repeal, the Supreme Court set out a simple, straightforward, and entirely sound analysis. The Court first noted that "repeals by implication are not favored. . . . When there are two acts upon the same subject, the rule is to give effect to both if possible."[71] To overcome that rule, legislative intent to repeal "must be clear and manifest."[72] To imply such an intention, otherwise unexpressed, "There must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."[73] After noting the presence of express antitrust immunities conferred when certain conditions were fulfilled under the Act, the *Borden* Court held that the explicit provisions of the Agricultural Act indicated the extent of any repeal of the Sherman Act and that any further immunity would have been clearly expressed by Congress in the Act itself.[74]

The doctrinal confusion indulged in *Terminal Warehouse*—essentially a confusion between primary jurisdiction and exclusive jurisdiction, better described as implied repeal—was first expressly limited in *Georgia v. Pennsylvania Railroad Co.* The *Georgia* Court first entirely rejected the *Terminal Warehouse* treatment of *Keogh. Keogh* was once again presented as a case concerning the private injury requirement of Section 7 of the Sherman Act.[75] The *Georgia* Court then provided its own explanation of *Terminal Warehouse* by quoting it for only a primary jurisdiction holding.[76] Moreover, the *Georgia* Court, after observing that Congress had not placed the combination allegedly condemned by the Sherman Act under the Commission, significantly stated, "Regulated industries are not *per se* exempt from the Sherman Act."[77] Directly contrary to the state-

69. 308 U.S. 188 (1939).
70. *Id.* at 197-98.
71. *Id.* at 198.
72. *Id.*
73. *Id.* at 198-99 (*quoting* Justice Story in Wood v. United States, 41 U.S. 342, 362-63 (1842)).
74. 308 U.S. at 201. The focus on Congress' intent is one phase of sound analysis that has been blurred in some lower court decisions.
75. 324 U.S. at 453.
76. *Id.* at 455.
77. *Id.* at 456.

ment by the Court in *Terminal Warehouse* that the antitrust laws simply are not applicable to carriers by water or rail, the *Georgia* Court emphatically held that "[t]hese carriers [were] subject to the antitrust laws."[78]

Thus, the doctrinal confusion caused by *Terminal Warehouse* was only momentary at the Supreme Court level. The *Terminal Warehouse* analysis has not been indulged since. *Terminal Warehouse* does not currently represent one of many conflicting states of the law, but rather is a thoroughly rejected anachronism.

Following *Georgia,* the Supreme Court, in *Far East Conference v. United States,*[79] formulated a doctrine of primary jurisdiction wholly distinct from any implied repeal doctrine.[80] The *Far East Conference* Court applied the common principle that in cases concerning the exercise of administrative discretion, "agencies created by Congress for regulating the subject matter should not be passed over."[81] This principle prevailed even when "the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."[82] The court reasoned that adherence to this principle correctly promoted uniformity and consistency in businesses subjected to specialized agency control. The Supreme Court later emphasized, in *Carnation Co. v. Pacific Westbound Conference,*[83] that this principle is completely different from the implied repeal doctrine.[84]

Finally, the Supreme Court had altogether distinguished primary jurisdiction from implied antitrust repeal. In *United States v. RCA,*[85] the Court paid particular attention to this distinction, devoting one section of its opinion to implied repeal,[86] and a second entirely separate section to primary jurisdiction.[87] The organization of this opinion foreshadowed the future state of the law and reflected the Court's complete emergence from earlier confusions. This is evidenced in *RCA's* discussion of implied repeal, in which the Court

78. *Id.*

79. 342 U.S. 570 (1952).

80. A good deal of the spade work was done in General Amer. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 432-33, *reh'g denied,* 309 U.S. 694 (1940). For a discussion of primary jurisdiction as distinguished from implied repeal see notes 29-32 and accompanying text *supra*.

81. 342 U.S. at 574-75.

82. *Id.*

83. 383 U.S. at 221 n.4.

84. This point was made clear in *Far East's* consideration of whether to stay or dismiss the antitrust action: "Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the District Court docket pending the Board's action . . . or order dismissal of the proceeding brought in the District Court." 342 U.S. at 576-77.

85. 358 U.S. 334 (1959).

86. *Id.* at 339-46.

87. *Id.* at 346-52.

plainly stated, "Whether these contentions [that the antitrust laws have been impliedly repealed] are to prevail depends substantially upon the extent to which Congress authorized the FCC to pass on antitrust questions, and this in turn requires examination of the relevant legislative history."[88] A detailed examination of the legislative history of the Act follows, from which the *RCA* Court concluded that "the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts."[89] Furthermore, in the next separately numbered section of the opinion, the Court significantly began, "We now reach the question whether, despite the legislative history, the over-all regulatory scheme of the Act requires invocation of a primary jurisdiction doctrine."[90] The Court then concluded that a primary jurisdictional reference was inappropriate.

In *Pan American World Airways, Inc. v. United States (Panagra)*,[91] the Court was confronted with a substantially different regulatory statute. The Civil Aeronautics Act of 1938[92] created a full panoply of government regulation.[93] Most importantly, the Civil Aeronautics Board was charged with comprehensive obligations to police competition in the airline industry.[94] The Supreme Court held that Congress had impliedly repealed the antitrust laws in the context of this extensive regulatory scheme.

This case represented no fundamental change in the law. It was the markedly different type of regulatory scheme that brought about

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88. *Id.* at 339.

89. *Id.* at 346.

90. *Id.*

91. 371 U.S. 296 (1963).

92. 52 Stat. 973 (1938).

93. Pervasive regulation was compounded by the Federal Aviation Act of 1958, 72 Stat. 731 (1958) (codified as amended at 49 U.S.C. §§ 1301-1542 (1976)). Federal regulation of this industry has been recently revamped. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

94. 49 U.S.C. § 1381 (1976 & Supp. 1979). The CAB was not to encourage unfair or destructive competition. *Id.* § 1302(c). Competition was also a mandate, at least to the extent that it assured the development of a sound system. *Id.* § 1302(d).

The CAB had a complex and conflicting set of directives. It was to regulate air transport to preserve its inherent advantages, promote a high degree of safety, foster sound economics, improve relationships among the carriers, and coordinate those relationships. *Id.* § 1302 (b). The promotion of adequate, economical, and efficient air carrier service accompanied the task of maintaining reasonable charges without unjust discrimination. *Id.*

Almost every aspect of the industry was subject to government control, including prices, exit, entry, and routes. *See id.* §§ 1301 1302, 1305-1308, 1324, 1341, 1371-1373, 1374, 1376, 1382, 1389, 1461, 1471, 1473, 1482, 1490, 1504. The Act required carriers to file tariff schedules with the CAB, allow public inspection of the filed tariffs, and to observe the tariffs as long as they were effective. *Id.* § 1373. Tariffs could be changed under the Act only on 30 day notice unless the CAB permitted a more expeditious change. *Id.* Tariff changes were primarily carrier-initiated. *Id.* Route control was effected through restrictions on the certificates of public convenience and necessity issued by the CAB. *Id.* § 1371(e)(1).

Panagra's different result.[95] *Silver v. New York Stock Exchange*[96] and *PNB*[97] were decided immediately after *Panagra.* These cases clearly and emphatically rejected any enhanced notion of implied repeal of the antitrust laws. The *Silver* Court first rejected a district court holding that the antitrust laws apply because the "substantive act of regulation engaged in here was outside the boundaries of the public policy established by the Securities Exchange Act of 1934."[98] The Court also rejected the court of appeal's conclusion that because the Exchange could adopt rules to govern members' conduct vis-a-vis non-members, particular application of the rules was outside the ambit of the antitrust laws.[99] Instead, the Court instructed, "the proper approach to this case, in our view, is an analysis which *reconciles* the operation of both statutory schemes with one another rather than holding one completely ousted."[100] The *Silver* Court then enunciated the following "guiding principle to reconciliation of the two statutory schemes": "*Repeal is to be regarded as implied only if necessary to make the [regulatory] Act work, and even then only to the minimum extent necessary.*"[101]

With that maxim in mind, the *Silver* Court focused on the particular act of self-regulation before it and concluded that the particular act was unnecessary to make the statute work.[102] Implied antitrust immunity was therefore denied[103] because the operation and enforcement of both statutes were reconcilable.

In *PNB,* the Court rejected the claim that the Bank Merger Act impliedly immunized approved mergers from antitrust challenge. Of first importance is the explanation of *Panagra* set forth in *PNB.*

> In *Pan American*, the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers; in contrast, the banking agencies have authority neither to enforce the antitrust laws against mergers . . . nor to grant immunity from those laws.[104]

The Court noted that no provisions in the Bank Merger Act corresponded to those referred to in the Civil Aeronautics Act. Conse-

95. *See* text accompanying note 104 *infra*.
96. 373 U.S. 341 (1963).
97. 374 U.S. 321 (1963).
98. 373 U.S. at 357.
99. *Id.*
100. *Id.* (emphasis added).
101. *Id.* (emphasis added).
102. *Id.* at 361.
103. *Id.* Implied immunity was sought solely on the ground of irreconcilability of the antitrust and regulatory statutes.
104. 374 U.S. at 351.

quently, the Court concluded that "the range and scope of administrative powers under the Bank Merger Act bear little resemblance to those involved in *Panagra.*"[105] It followed therefore that Congress, in passing the Bank Merger Act, did not intend to affect the applicability of antitrust laws.[106] Analysis of *PNB* reveals that the Supreme Court examined both irreconcilability and legislative intent to repeal to determine the implied repeal contention. A finding of implied immunity was denied when neither irreconcilability nor legislative intent could be established.[107]

The next major development[108] in the law of implied repeal followed the decisions in two cases under statutory schemes bearing somewhat greater resemblance to the statutory scheme in *Panagra. Gordon v. New York Stock Exchange, Inc.*[109] and *United States v. National Association of Securities Dealers (NASD)*[110] are important not so much for their holdings, but rather for language in each that has been urged in favor of much broader antitrust immunities generally. Chief Judge Pence, in his second decision in *IT&T v. GTE*,[111] put the matter extraordinarily well when he wrote,

> What we have, then, after a review of most of the cases, is an ocean of antitrust punctuated by isolated islands of implied immunity. GTE claims, however, that the most recent of the relevant Supreme Court pronouncements, *Gordon* and *NASD*, have pushed up a whole continent of exemption and have sent the waters rolling.[112]

Neither *Gordon* nor *NASD*, however, represent such a sharp break with the past. Both *Gordon* and *NASD* turned on affirmative show-

105. *Id.* at 351-52.

106. Nor did Congress in passing the Bank Merger Act, embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecesary, in light of the completeness of the regulatory structure, or disruptive of that structure. On the contrary, the legislative history of the Act seems clearly to refute any suggestion that applicability of the antitrust laws was to be affected.

Id. at 352.

107. Also important is the fact that thereafter—and entirely separately—the Court also rejected the applicability of the primary jurisdiction doctrine. In that discussion, the Court wrote the following simple and definitive statement that clarified the nature of primary jurisdiction: "Court jurisdiction is not thereby ousted, but only postponed." *Id.* at 353.

108. Developments in the next decade essentially clarified prior law. *Carnation,* for example, is significant mainly for its construction of prior decisions, particularly *United States Navigation* and *Far East Conference*. Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) actually involved the scope of express, not implied, immunities. *Id.* at 368-77, 379, 382-84, 388-89; *see* note 18 and accompanying text *supra*.

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) was a straightforward application of the unarticulated no-irreconcilability, no-affirmative showing of legislative intention to repeal analysis. Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973) and Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973) clarified the now entirely separate primary jurisdiction doctrine.

109. 422 U.S. 659 (1975).

110. 422 U.S. 694 (1975).

111. 449 F. Supp. 1158 (D. Hawaii 1978).

112. *Id.* at 1166, 1167 (citations omitted).

ings of legislative intentions to repeal. These legislative intentions were peculiar to the statutes involved. Thus, *Gordon* and *NASD* are not "a whole [new] continent of exemption,"[113] but only two more islands.[114]

Because both *Gordon* and *NASD* have been so often urged in support of far wider propositions—for which neither properly stands—an analysis of these two cases in further detail is necessary.[115] The plaintiff in *Gordon* alleged that sections 1 and 2 of the Sherman Act were violated by the system of fixed commission rates utilized by the New York Stock Exchange for transactions of less than $500,000.[116] To determine whether Congress intended such a claim to be barred by an implied repeal of the antitrust laws, the Supreme Court looked to the legislative history of section 19(b) of the Securities and Exchange Act of 1934.[117] In particular, the Court noted and relied on the fact that in the hearings on the proposed bill, Mr. Samuel Untermeyer testified that "the bill would provide the federal supervisory commission with 'the right to prescribe uniform rates of commission, [but] it does not otherwise authorize the Commission to fix rates, which it seems to me it should do and would do by striking out the word "uniform."' That would permit the Commission to fix rates."[118]

Congress apparently followed Mr. Untermeyer's suggestion because section 19(b) as enacted actually omits the word "uniform" and expressly provides for the "fixing of reasonable rates of commission." The word "reasonable" was inserted in place of the stricken "uniform." This was expressly noted and relied upon by the Supreme Court.[119] More importantly, section 19(b) of the Securities and Exchange Act of 1934 is expressly concerned with and authorizes the Securities Exchange Commission (SEC) to make "*such changes as are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in* upon such exchange or to insure fair administration of such exchange. . . ."[120]

113. *Id.*

114. Interestingly enough, only one "island" now remains. The fixed commission scheme that provoked *Gordon* is no longer authorized. A 1975 amendment to the securities laws prohibits such rate-fixing subject to certain qualifications. *See* 15 U.S.C. § 78f(e)(1) (1976).

115. *See, e.g.,* Comment, *The Application of Antitrust Law to Telecommunications,* 69 CALIF. L. REV. 497 (1981).

116. 422 U.S. at 661.

117. *Id.* at 665-67.

118. *Id.* at 665-66. The quoted testimony also states that "the commission charged should be either fixed by some governmental authority or supervised by such authority." *Id.*

119. *Id.* at 666.

120. *Id.* (emphasis added). *See also id.* at 685, in which the Court noted,

> Not only was the SEC authorized to disapprove rules and practices concerning commission rates, but the agency also was permitted to require alteration or supplementation of the rules and practices when 'necessary or appropriate for the protection of investors and to insure fair dealings in securities traded in upon such exchange.'

Unquestionably, this language substantially strengthens the analogy to *Panagra,*[121] in which the Federal Aviation Act delegated the responsibility for policing fair trade in the airlines industry to the Civil Aeronautics Board.[122] Generally, however, there is no such delegation in the regulatory statutes. In *Gordon,* the delegation of regulatory administration of competition was expressed in the very section of the act dealing with fixed commission rates. That, however, was not the end of the matter. The *Gordon* Court next observed that section 19(b), seemingly permitting fixed commission rates subject to disapproval by the SEC, was enacted seven years after price-fixing had been flatly outlawed by the Supreme Court as a per se violation of the Sherman Act.[123] In this context the Court held that legislative permission to fix rates under SEC regulation, when consciously undertaken by Congress seven years after the Supreme Court had unequivocally prohibited the practice, satisfied the requirement of an affirmative showing of legislative intent for implied repeal of the antitrust laws.[124]

The Supreme Court followed a similar pattern of analysis in *NASD.* The Court first considered the Government's challenge to alleged vertical resale price maintenance[125] and, second, an alleged horizontal combination to restrict secondary trading of such shares.[126] The *NASD* opinion begins with an examination of section 22(f) of the Investment Company Act,[127] which the Court describes as authorizing "mutual funds to impose restrictions on negotiability and transferability of their shares, provided they conform with the fund's registration statement and do not contravene any rules or regulations the Commission may prescribe in the interests of the holders of all of the outstanding securities."[128] To determine Congress' intent in enacting section 22(f), the Court expressly relied on an SEC study that recommended enactment of the Investment Company Act,[129] on testimony that the restrictions on secondary trading of mutual funds should be a "matter of rules and regulations,"[130] and on the contemporaneous construction of the statute finally endorsed by an agency not only charged with the act's administration[131] but

121. 371 U.S. 296. *See* National Gerimedical Hosp. v. Blue Cross, 452 U.S 378, 389 (1981).

122. *See* 49 U.S.C. § 1381 (1976).

123. 422 U.S. at 681-82.

124. *Id.* at 691. Justices Stewart and Brennan concurred *only* on the ground that there had been an affirmative showing of legislative intent to repeal. *Id.* at 693.

125. *Id.* at 720-30.

126. *Id.* at 701, 731-35.

127. 15 U.S.C. §§ 80a-1 to 80a-52 (1976).

128. 422 U.S. at 720, 721.

129. *Id.* at 704, 722-25.

130. *Id.* at 722 n.35.

131. *Id.* at 725.

also largely responsible for its enactment.[132] All of these are traditional sources of congressional intent.[133] However, an affirmative showing of a legislative intention to regulate is not, per se, a showing of a legislative intention to repeal the antitrust laws.[134] Consequently, the Court's analysis did not stop with these sources. Instead, the Court noted that the practices which Congress sought to permit as "matter[s] of rules and regulations,"[135] the antitrust laws had already forbidden as per se violations.[136] Thus, the Court concluded that Congress had determined that limitations on competition were necessary because of the unique problems of the mutual fund industry. Congress therefore "vested *in the SEC* final authority to determine whether and to what extent they should be tolerated '*in the interests of the holders of all the outstanding securities*' of mutual funds."[137]

The dissent in *NASD* took the position that both *Gordon* and *Panagra* addressed statutes expressly directing regulatory agencies to oversee the interplay of competitive forces;[138] by contrast, the dissent found similar direction lacking in the Investment Company Act.[139] In *Panagra,* for example, the direction to the Civil Aeronautical Board was to investigate and bring to a halt "unfair or deceptive practices or unfair methods of competition."[140] In *Gordon,* the statute directed the agency to make "such changes as are necessary or appropriate for the protection of investors or to insure fair dealing. . . ."[141] In *NASD,* however, to the extent that the Court considered a statutory direction to the agency to oversee competition, it was only a directive to act "in the interests of the holders of all of the outstanding securities."[142]

NASD thus seems to have involved a far narrower direction to the relevant agency, but the gap is not as wide as might at first appear. The Court twice referred to section 3(b) of the Maloney Act,[143] which provides that no association can be registered as a national

132. *Id.* at 722.

133. *See, e.g.,* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-86 (1969).

134. *See, e.g.,* Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945).

135. 422 U.S. at 729.

136. *Id.*

137. Here, however, *Congress has made a judgment* that these restrictions on competition might be necessitated by the unique problems of the mutual-fund industry, and has invested *in the SEC* final authority to determine whether and to what extent they should be tolerated *'in the interests of the holders of all the outstanding securities'* of mutual funds. 15 U.S.C. § 80a-22(f).

Id. at 729 (emphasis added). Whether or not Congress had made such a judgment, the Court unanimous in *Gordon,* now split five to four.

138. *Id.* at 741-43.

139. *Id.*

140. 49 U.S.C. § 1381 (1976), *quoted in Panagra,* 371 U.S. at 302.

141. 15 U.S.C. § 78s(b) (1976), *quoted in Gordon,* 422 U.S. at 666.

142. 15 U.S.C. § 80a-22(f) (1976), *quoted in NASD,* 422 U.S. at 721 n.33.

143. 15 U.S.C. § 780-3(b) (1976), *noted in NASD,* 422 U.S. at 700 n.6, 732.

securities association unless the association's internal rules are designed "to remove impediments to and to perfect the mechanism of a *free and open market*. . . ."[144] This directive to the agency is similar to that in *Gordon,* although it is not as broad as the directive given to the Civil Aeronautics Board in *Panagra.* Notably, the Court mentions section 3(b) in its discussion of the alleged horizontal combination.[145] The statute therefore clearly cuts across the entire gamut of the question presented.[146]

In marked contrast are regulatory statutes based generally on the Interstate Commerce Act. These regulatory schemes provide that review of the acts of a regulated entity is discretionary with the agency.[147] Thus, *NASD* was decided in a regulatory context that is fundamentally different from the ordinary situation. *NASD* emphasizes the necessity to consider the distinctions among regulatory statutes,[148] as well as the distinction between repeal implied by reason of irreconcilability and repeal implied by reason of affirmative showings of legislative intentions to repeal.

Whether the Court in *NASD* properly found an affirmative showing of legislative intent to repeal from the narrow directions of section 22(f) of the Investment Company Act itself or from the statute taken together with section 3(b)(8) of the Maloney Act is a very close question, evidenced by the Supreme Court's five-four split. It is also clear, however, that neither *Gordon* nor *NASD,* despite some overly broad language in each, actually "pushed up a whole [new] continent of exemption."[149] More precisely, each case turned on specific legislative intentions and is simply another tiny island of implied immunity in a vast ocean of antitrust liability.[150]

Thus, two grounds—and only two grounds—will support an implied repeal: the first is irreconcilability and the second is an affirmative showing of legislative intent to repeal by implication. The latter criterion has only been satisfied in cases in which the repealing act contains a directive to the regulatory agency to police the interplay of competitive forces.[151] The irreconcilability criterion requires, at a minimum, that the statutes produce differing results. This finding alone is not sufficient however.[152] Rather, to find "irreconcilabil-

144. 15 U.S.C. § 79o-3(b) (1976) (emphasis added).

145. 422 U.S. at 732.

146. At the very least, the Maloney Act mandates SEC review of NASD rules "to remove impediments to and to perfect the mechanism of a free and open market." 15 U.S.C. § 79o-3(b) (1976).

147. *See, e.g.,* Southern Ry. Co. v. Seaboard Allied Milling, 442 U.S. 444 (1979).

148. *See* notes 154-196 and accompanying text *infra.*

149. IT&T v. GT&E, 449 F. Supp. at 1166-67.

150. This characterization of *Gordon* and *NASD* seems to have been endorsed recently by the Supreme Court. National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378, 389 (1981).

151. *See, e.g., Panagra,* 371 U.S. at 296; *Gordon,* 422 U.S. at 659; *NASD,* 422 U.S. at 694.

152. Radzanower v. Touche Ross & Co., 426 U.S. at 155.

ity" there must be a determination that repeal of the antitrust laws is necessary to make the regulatory act work.[153] This requires an appreciation of the nature of the various regulatory acts.

IV. The Differing Nature of the Regulatory Schemes

No two regulatory statutes are identical. Few are even slightly similar. For example, in section 411 of the Federal Aviation Act,[154] Congress has given the Civil Aeronautics Board broad power to investigate and to bring to a halt "unfair practices and unfair methods of competition."[155] Because of this broad delegation of power over competition in the airline industry, the Court in *Panagra*[156] held that relief against division of territories, allocation of routes, and the conspiracy to monopolize alleged therein were matters exclusively for the Board.[157] Section 411, however, is virtually unique.[158]

Even among statutes based in some general sense on the Interstate Commerce Act[159] significant differences exist.[160] Statutes providing for regulation of rail common carriers, for instance, include provisions giving the ICC virtual direct control over the day-to-day management of railroads.[161] No similar managerial provisions apply to communications common carriers[162] or motor common carri-

153. Silver v. New York Stock Exch., 373 U.S. at 357.

154. 49 U.S.C. § 1381 (1976).

155. 49 U.S.C. § 1381 (1976).

156. 371 U.S. 296 (1963). *See* notes 91-94 and accompanying text *supra*.

157. 371 U.S. at 312; *accord PNB,* 374 U.S. at 351.

158. For a brief discussion of the comprehensive regulation that was formerly found in the airline industry, see notes 93-94 and accompanying text *supra*.

159. *See* text accompanying notes 162-164 *infra*. *See generally* Interstate Commerce Act (Revised), Pub. L. No. 95-473, 92 Stat. 1337 (1978) (codified at 49 U.S.C. §§ 10101-11901 (1976)).

160. *Compare* The Federal Aviation Act, 49 U.S.C. §§ 1301-1542 (1976), *amended by* Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (1978), which is discussed at greater length at notes 93-94 and accompanying text *supra, with* the Shipping Act, 46 U.S.C. §§ 801-842 (1976), which is discussed in greater detail at note 164 *infra,* and the Federal Power Act, 16 U.S.C. §§ 791a-823 (1976).

161. The Transportation Act of 1920, Pub. L. No. 152, 41 Stat. 456, put the ICC directly into many phases of rail management. The ICC often appears to be a superboard of directors for certain aspects of the national rail industry. *See* I THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 3 (B. Schwartz ed. 1973). The ICC is empowered to establish connections and rates for rail and water transportation, 49 U.S.C. § 10503 (1976), and to authorize the construction and operation of rail facilities, *id.* § 10901. It also controls the abandonment and discontinuance of rail lines. *Id.* § 10703. The ICC has the power to prohibit rebates, *id.* § 10704, establish reasonable rates, *id.,* and establish through-rates, *id.* § 10703. The ICC also possesses the power to inquire into the daily management of the railroads and to substitute its judgment. *Id.* § 10321. Thus, the ICC regulation of rail transportation was, in many instances, direct management of the industry by regulators. *See* B. Schwartz, *supra*, at 5. Congress has recently taken major steps to deregulate the industry with the Staggers Rail Act of 1980, 49 U.S.C. §§ 10101-11901 (1976 & Supp. 1979).

162. The Communications Act of 1934 was the culmination of earlier attempts to regulate telephone and telegraph common carriers and the radio. Pub. L. No. 416, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 151-155 (1976)).

The first *minimal* regulation of the telecommunications industry occurred with the passage of the Mann-Elkins Act of 1910, Pub. L. No. 218, 36 Stat. 539. Telecommunications carriers were then regulated as common carriers, but that regulation was not as extensive as the ers;[163] nor do any similar managerial provisions exist in the Shipping Act,[164] the Bank Merger Act,[165] the Natural Gas Act,[166] or the Fed-

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Interstate Commerce Act of 1887, which merely required railroads to publish and file just and reasonable rates with the ICC. The Act also prohibited certain discriminations. *See* Interstate Commerce Act, ch. 104, §§ 1-3, 6, 24 Stat. 379 (1887). Tariffs were carrier-generated. The ICC was limited to consumer protection and enforcing antidiscrimination policies. Although the Mann-Elkins Act enlarged ICC jurisdiction over railroads, it did not subject wire common carriers to the extensive ICC tariff procedures. The telecommunications industry was merely subjected to the extant consumer protection scheme. Increased regulation of the rail industry did not provide a coincident increase in the regulation of telecommunications. *See* Western Union Tel. Co. v. Esteve Bros., 256 U.S. 566, 573 (1921) (all common carriers are subject to antidiscrimination principles, but differences exist between the regulation of rail and telecommunication carriers).

The Transportation Act of 1920 substantially increased the regulation of rail common carriers. Pub. L. No. 152, 41 Stat. 456. It made express provisions for pooling and other anticompetitive activities that would have violated the Sherman and Clayton Acts. *Id.* at § 407. With the exception of one minor increase in ICC power to enforce its anti-rebate duty, however, telecommunication regulation remained virtually unchanged. *See id.* § 404.

The Willis-Graham Act addressed the problem of competing local exchanges that resulted in waste and inconvenience as a consequence of the duplication of facilities. Pub. L. No. 15, 42 Stat. 27 (1921). The statute authorized the ICC to approve consolidations that were "of advantage to the persons to whom service is to be rendered and in the public interest." *Id.* § 27.

It appears that the Willis-Graham Act was enacted because of congressional misunderstanding of the scope of earlier legislation. Congress believed that the Sherman and Clayton Acts did apply to state action. Parker v. Brown, 317 U.S. 341 (1943) had yet to be decided. Consequently, many of the floor debates prior to *Parker* indicate that sponsors thought the Sherman Act would apply to consolidations *compelled* by state regulatory actions unless the Act was repealed when those consolidations were perceived to be in the public interest. *See, e.g.,* 61 CONG. REC. 1985 (1921) (remarks of Rep. Graham). Thus, Congress first provided that the ICC should evaluate the public interest from the federal viewpoint. Congress did not leave the industry to state regulatory power but established a federal agency to determine that public interest. If that agency determined the merger to be in the public interest, the consolidation would be approved and there would be no antitrust enforcement. Moreover, after *Parker*, whenever a state-compelled consolidation of a local operating company in the state's public interest, the Willis-Graham Act was superfluous.

Thus, the telecommunication common carriers were subject to the consumer protection and antidiscrimination aspects of the Interstate Commerce Act and exempt from antitrust prosecution for certain local consolidations. The industry was otherwise subject to the enforcement of the antitrust laws. *See* United States v. AT&T, 1 Decrees & Judgments in Civil Federal Antitrust Cases 554 (D. Ore. 1914), *modified,* 1 Decrees & Judgments in Civil Federal Antitrust Cases 659 (D. Ore. 1914); 1 Decrees & Judgments in Civil Federal Antitrust Cases 572 (D. Ore. 1918); 1 Decrees & Judgments in Civil Federal Antitrust Cases 574 (D. Ore. 1922).

While broadcasting is a regulated industry, it is regulated in a unique manner. The FCC is authorized to license broadcasters, 47 U.C.C. §§ 301, 307 (1976), and prescribe services, *id.* § 303 (b). It has the right to prescribe frequency bands, *id.* § 303(c), station locations, *id.* § 303(d), regulate interference, *id.* § 303(c), and regulate network broadcasting, *id.* § 303(i). Thus, while the basis of much of the Act was earlier regulation under the ICC, the direct managerial regulation of rail carriers by the ICC was never applied to broadcasting. The broadcasting industry is subject to antitrust laws. *See* United States v. RCA, 358 U.S. 334 (1959).

163. 49 U.S.C. §§ 301-327 (1976).

164. Ocean shipping is regulated by the Shipping Act of 1916, Pub. L. No. 260, 39 Stat. 728. Like the telecommunications, power, and many other regulated industries, tariffs are initiated by carriers when they are filed with the reluctant agency, in this case the Federal Maritime Commission (FMC). Rebates and discriminatory rates are prohibited. 46 U.S.C. § 812 (1976). Dual rates are allowed for a carrier engaged in foreign commerce to give lower rates to shippers who agree to give exclusive patronage to certain carriers or to a conference of carriers. Discriminatory and unjust rates are prohibited. *Id.* §§ 815-816. Thus, while the FMC may reject rates if they are discriminatory or unjust, the power to change the tariffs resides prima-

eral Power Act.[167]

When the government exercises direct managerial control, the situation regarding antitrust immunity is markedly different. An antitrust action generally challenges a business' free exercise of its business judgment. If the regulatory agency directs that business judgment,[168] a business' freedom is restrained, and it might be unfair to subject the agency-dictated business undertaking to an antitrust challenge.[169] Conversely, when the regulated entity freely exercises its "business judgment as to the desirability of the [challenged conduct],"[170] then, as the Court concluded in *RCA,* "Like unregulated concerns, they . . . make this judgment with the knowledge that the challenged conduct might run afoul of the antitrust laws."[171] As the Court similarly advised in *Otter Tail Power Co. v. United States,*[172] "[W]hen [the regulated entity's challenged conduct is] governed in the first instance by business judgment and not by regulatory coercion"[173] antitrust immunity is then generally inappropriate.

This explains the Court's statement in *FCC v. RCA*[174] that "policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, as has been true of railroads."[175] Most significant in support of that comment is the Court's citation, which reads as follows:

> *Compare, e.g., United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290, 17 S. Ct. 25, 43 L. Ed. 1007 and *United States v. Joint Traffic Assn.,* 171 U.S. 505, *with* the Transportation Act of 1920, 41 Stat. 456, 480; *Consolidation of Railroads*, 63 I.C.C. 455.[176]

This citation is significant because it was the Transportation Act of 1920 that gave the ICC its managerial control of rail common carriers. Furthermore, *Trans-Missouri Freight*[177] and *Joint Traffic Association*[178] held that otherwise the antitrust laws apply even to rail common carriers.

Decidedly different was the regulation of communications com-

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rily with the carriers. *Id.* § 817. There is minimal regulation or interference with the business judgment of the ocean carriers in this scheme.

165. 12 U.S.C. § 1828(c) (1976).

166. 15 U.S.C. §§ 717-717w (1976), *amended by* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. § 3301 (1976 & Supp. III 1979)).

167. 16 U.S.C. §§ 791a-828c (1976).

168. *See* B. Schwartz, *supra* note 161, at 3. *See also* notes 171-173 and accompanying text *infra*.

169. *See generally* Cantor v. Detroit Edison Co., 428 U.S. 579, 592-92 (1976).

170. United States v. RCA 358 U.S. 334, 350 (1959).

171. *Id.* at 350-51.

172. 410 U.S. 366 (1973).

173. *Id.* at 374.

174. 346 U.S. 86 (1953).

175. *Id.* at 92.

176. *Id.*

177. 166 U.S. 290 (1897).

178. 171 U.S. 505 (1898).

mon carriers,[179] motor common carriers,[180] common carriers by water,[181] common carriers by air,[182] broadcasters,[183]power,[184] and other industries.[185] Typical to common carrier regulation was the employment of tariffs.[186] There are two basic forms of tariffs—carrier-initiated and Commission-prescribed. Carrier-initiated tariffs often become effective without Commission scrutiny or approval.[187] However, "A Commission-prescribed rate or practice must be followed by the carrier. It becomes the lawful rate or practice. *But where the carrier initiates the rate or practice its unlawfulness remains open, not only to a prospective finding but also to a retroactive one.*"[188]

The essential difference between carrier-initiated and commission-prescribed tariffs is that a carrier-initiated tariff may be changed whenever, after proper notice, the carrier desires to file a new carrier-initiated tariff.[189] A commission-prescribed tariff cannot be overcome by a contrary carrier-initiated tariff.[190] Instead, a commission-prescribed tariff must be followed until the previous public interest determination is altered.[191] Moreover, a commission-prescribed tariff cannot be retroactively unlawful.[192] This distinction between

179. *See* the Communications Act, Pub. L. No. 416, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 151-155 (1976)). For a brief analysis of the telecommunication regulation see note 162 *supra.*

180. *See* note 163 *supra.*

181. *See* 49 U.S.C. §§ 901-923 (1976) (water common carriers) and 46 U.S.C. § 801-842 (1976) (ocean shipping). See also note 164 *supra* for a brief review of the ocean shipping regulatory scheme.

182. *See* notes 93-95 and accompanying text *supra.*

183. *See* note 162 *supra.*

184. *See* note 167 *supra.*

185. The Bank Merger Act of 1966, Pub. L. No. 89-485, 80 Stat. 238 (1966) (codified at 12 U.S.C. § 1828(c) (1976)).

186. It should be understood at the outset precisely what is—and what is not—included in the term "tariff." No legislative or administrative determination necessarily precedes or antecedes practices initiated by the carrier. Rather, under 46 U.S.C. § 203 (1976), for example, carriers are required to "designate, file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges." These schedules are referred to as "tariffs." The practices thus published are referred to as "tariff practices." On proper notice, any carrier-initiated tariff may be changed by a new carrier-initiated tariff describing some new practice. A tariff is "carrier-initiated" when the carrier simply files a description of a practice. A tariff is "Commission-prescribed" when the practice is ordered by the Commission as in the public interest. *See, e.g.,* 47 U.S.C. § 205 (1976).

187. FCC Amicus Brief at 20, United States v. AT&T, 427 F. Supp. 57 (D.D.C. 1976). In a footnote, the FCC pointed out, "In a recent 12-month period [September 1974 through August 1975], the Commission received 1,371 tariff filings totaling 11,491 pages. This does not count the voluminous supporting papers filed with the tariffs. The Commission obviously could investigate only a small percentage of these filings." *Id.* at 20 n.23. This sort of difficulty is very common.

188. *In re* Carterfone, 13 FCC 2d 420, 425, *reh'g denied,* 14 FCC 2d 571 (1968) (emphasis added).

189. 47 U.S.C. §§ 203(b)(1), 204(a) (1980). *See also* Strassburg, *The Common Carrier & Regulation,* 28 FED. COMMUN. BAR J. 113, 190 (1975).

190. *E.g.,* Arizona Grocery Co. v. Atchinson, Topeka & S.F. Ry. Co., 284 U.S. 370, 387 (1932).

191. *Id.; In re* Carterfone, 13 FCC 2d 420, 425; *reh'g denied,* 14 FCC 2d 571 (1968).

192. Arizona Grocery Co. v. Atchinson, Topeka & S.F. Ry. Co., 284 U.S. 370, 389 (1932).

carrier-initiated and commission-prescribed tariffs is important. Commission-prescribed tariffs embody public interest determinations; carrier-initiated tariffs embody the "carriers' independent business judgement."[193]

Even rail common carrier regulation and managerial control have never been considered sufficient, without more, to completely oust application of the federal antitrust laws.[194] The antitrust laws embody fundamental national economic policies[195] with which there simply can be no *inherent* inconsistency. Any alleged inconsistency must be so extreme that it amounts to irreconcilability[196] and it must be concretely shown.

This brief review illustrates that the conduct of an entity under the carrier-initiated tariffs under any of these statutes may be the result of the business judgment of the regulated entity. Even when the regulated entity's carrier-initiated tariff conduct is not disapproved under one of these regulatory statutes, it is nonetheless the regulated entity that in fact and law determines *whether to undertake* the conduct in the first instance and, once undertaken, *whether to continue* the conduct.

V. The Issue In The Courts

The reconciliation of Supreme Court cases proposed above has never been explicitly adopted by any court to accommodate regulatory and antitrust statutes.[197] Seven courts of appeals[198] and approximately a dozen district courts[199] have recently addressed the issue of

193. FCC Amicus Brief at 20, United States v. AT&T, 427 F. Supp. 57 (D.D.C. 1976).

194. Of course, when these direct managerial provisions are not involved the antitrust laws still apply. *E.g.,* Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945); Sunoco Energy Development v. Burlington Northern, Inc., 1980-1 TRADE CAS. (CCH) ¶ 63,196 (D. Wyo. 1980).

195. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966), *modified by* 383 U.S. 932; *see also* National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378, 388-89 (1981).

196. For a discussion of irreconcilability see notes 271-310 and accompanying text *infra*.

197. It seems that the court in Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979) actually used this approach. Judge Waddy in United States v. AT&T, 427 F. Supp. 57 (D.C. 1976) also seems to have employed this approach. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), and National Gerimedical v. Blue Cross, 452 U.S. 378 (1981) also appear to be based on this approach. Nevertheless, no court has expressly adopted this rationale to accommodate antitrust and regulatory statutes.

198. Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716 (9th Cir. 1981); Northeastern Tel. Co. v. AT&T, 651 F.2d 76 (2d Cir. 1981); Sound, Inc. v. AT&T, 631 F.2d 1324 (8th Cir. 1980); Mid-Texas Communication Sys., Inc. v. AT&T, 615 F.2d 1372 (5th Cir.), *cert. denied,* 449 U.S. 912 (1980); Essential Communication Sys., Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979); Industrial Communications Sys., Inc. v. Pacific Tel. & Tel., 505 F.2d 152 (9th Cir. 1974); IT&T v. GT&E, 518 F.2d 912 (9th Cir. 1975).

199. Jarvis, Inc. v. AT&T, 481 F. Supp. 120 (D.D.C. 1978); Northeastern Tel. Co. v. AT&T, 477 F. Supp. 251 (D. Conn. 1978), *aff'd, rev'd, and rem'd on other grounds,* 651 F.2d 76 (2d Cir. 1981); Litton Systems, Inc. v. AT&T, 487 F. Supp. 942 (S.D.N.Y. 1980); Interconnect Planning Corp. v. AT&T, 465 F. Supp. 811 (S.D.N.Y. 1978); MCI Communications Corp. v. AT&T, 462 F. Supp. 1072 (N.D. Ill.), *cert. denied,* No. 78-2457 (7th Cir. Nov. 30, 1978); DASA

implied antitrust immunity for telephone companies. Almost as many rationales exist for the decisions. For example, in *Northeastern Telephone Co. v. A.T.&T.,*[200] the Second Circuit described two narrowly defined situations in which implied repeal of the antitrust laws by a later regulatory statute would be permissible. One of those circumstances was "when the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition. . . ."[201] In the Third Circuit, however, pervasiveness is not an independent ground for implied repeal, but rather just one indication of congressional intent.[202]

The Central District of California[203] and the District of Oregon[204] recognized a four-factor test that has very little to do with either congressional intent, irreconcilability, or pervasiveness,[205] and the Ninth Circuit has held that the entire matter is *solely* one of congressional intent.[206] A similar five-factor test has been proposed[207], as well as an eight-factor test,[208] and a three-factor test.[209] The District of Columbia[210] and the Northern District of Illinois[211] seem to agree on the two circumstances in which implied repeal may be proper,[212] but they differ substantially on the proper analysis to be

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Corp. v. GT&E, 1977-2 TRADE CAS. (CCH) ¶ 61,610 (C.D. Cal. 1977), *rev'd,* 664 F.2d 716 (9th Cir. 1981); Western Elec. Co. v. Milgo Electronics Corp., 1978-1 TRADE CAS. (CCH) ¶ 61,960 (S.D. Fla. 1976, *appeal dismissed,* 568 F.22 1203 (5th Cir.), *cert. denied,* 439 U.S. 895 (1978); United States v. AT&T, 427 F. Supp. 57 (D.D.C. 1976), *cert. denied,* 429 U.S. 1071 (1977), *aff'd on rehearing,* 461 F. Supp. 1314 (D.D.C. 1978), *mandamus denied sub nom. In re* AT&T, No. 78-761 (D.C. Cir. Oct. 31, 1978), *cert denied,* 439 U.S. 1090 (1979); Chastain v. AT&T, 401 F. Supp. 151 (D D.C. 1975); Phonetele, Inc. v. AT&T, 435 F. Supp. 207 (C.D. Cal. 1977), *rev'd,* 664 F.2d 716 (9th Cir. 1981); IT&T v. GT&E, 351 F. Supp. 1153 (D. Hawaii 1972), *rev'd on other grounds,* 518 F.2d 913 (9th Cir. 1975), *on remand,* 449 F. Supp. 1158 (D. Hawaii 1978).

200. 651 F.2d 76 (2d Cir. 1981).

201. *Id.* at 82.

202. Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1117 n.8 (3d Cir. 1979).

203. Phonetele, Inc. v. AT&T, 435 F. Supp. 207 (C.D. Cal. 1977), *rev'd,* 664 F.2d 716 (9th Cir. 1981),

204. Selectron, Inc. v. Pacific Northwest Bell Tel. Co., No. 76-965-BE (D. Ore. June 19, 1978), *app. filed,* No. 78-2529 (9th Cir. June 19, 1978).

205. The four factors considered by the *Phonetele* court were as follows: (1) Are the acts charged the "precise ingredients" of the regulatory authority? (2) Can the regulatory agency grant relief? (3) Is competition a component of the regulatory standard? (4) Does the regulatory agency have expertise to which the courts have deferred? 435 F. Supp. at 212-13.

There is nothing inherently unreasonable about the particular four factors chosen; they are simply irrelevant to the approach adopted by the Supreme Court. Furthermore, the factor approach to reading the cases is an inherent disaster. It is not sufficient to examine a case for particular legal or factual elements and then compare the presence or absence of those elements with the results reached. What is omitted from such analysis is the heart of the case—the *ratio decidendi,* the reasoning, the holding.

206. Phonetele, Inc. v. AT&T, 664 F.2d 716, 726 (9th Cir. 1981); Mt. Hood Stages v. Greyhound Corp., 555 F.2d 687, 691 (1977), *vacated and remanded,* 437 U.S. 322 (1978).

207. *See* 85 YALE L.J. 254, *supra* note 5.

208. *See* 57 TEX. L. REV., *supra* note 5.

209. Phonetele, Inc. v. AT&T, 664 F.2d 716, 726 (9th Cir. 1981) (Claiborne, J., dissenting).

210. United States v. AT&T, 461 F. Supp. 1314, 1322-23 (D.C. 1978) [hereinafter referred to as *United States II*].

211. MCI Communications Corp. v. AT&T, 462 F. Supp. 1072, 1082 (N.D. Ill. 1978).

212. *See* notes 210-11 *supra.*

undertaken.[213] In short, as the Eighth Circuit justly complained, "The statutory schemes of regulation, the implementation of those schemes and the competitive situations have varied so greatly from industry to industry that no clear path for determining whether implied immunity exists has been illuminated."[214] We write precisely to light such a clear path to sound analysis.

VI. Proper Analysis of the Issues

The law of statutory construction mandates a straightforward two-pronged analysis. The first question is whether an affirmative showing of legislative intent to repeal can be made. If not, the question is simply whether the statutes are irreconcilable—whether the statutes produce differing results. If no affirmative intent to repeal exists and the statutes do not produce differing results, implied repeal is simply impermissible.[215]

Two types of immunity claims have been presented and are distinguishable. One is a claim for blanket immunity. The other is a claim for immunity regarding particular conduct.

A. Blanket Immunity

The claim of blanket immunity asserts that the requested immunity should cover everything. Congress has never expressly exempted an entire industry from the operation of the antitrust laws and no court has ever implied such a broad-based immunity. When Congress has granted express immunity, it typically has provided that when certain steps are taken — usually the approval or failure to disapprove by a regulatory agency — the antitrust laws do not apply to the particular transaction approved or not disapproved.[216] Claims of implied blanket immunity have been repeatedly rejected.[217]

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213. For example, while *MCI* seems to have turned on extensive legislative history, 462 F. Supp. at 1087, this legislative history was entirely unmentioned in *Jarvis.* Altogether different parts of the legislative history were relied on in *United States II.* Moreover, *United States II* seems to have turned in part on the comparative weakness of the regulatory scheme under the Communications Act as an indication of legislative intentions. 461 F. Supp. at 1326-27. Such comparisons of pervasiveness versus weakness were also unmentioned in *Jarvis* and *Northeastern. Northeastern* and *MCI* relied on comparisons of the statutes involved. Similar comparisons were generally omitted from *Jarvis* and even from *United States II.*

214. Sound, Inc. v. AT&T, 631 F.2d 1324, 1327 (8th Cir. 1980).

215. *See, e.g.,* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190 (1978); Morton v. Mancari, 417 U.S. 535, 550 (1974); Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973).

216. *See generally* Federal Maritime Comm'n. v. Seatrain Lines, Inc., 411 U.S. 726 (1973); *Carnation,* 383 U.S. at 216-17; *Borden,* 308 U.S. at 198-200.

217. *See, e.g.,* Silver v. New York Stock Exch., 373 U.S. at 357; MCI Communications Corp. v. AT&T, 462 F. Supp. 1072, 1080-83 (1978); Northeastern Tel. Co. v. AT&T, 477 F. Supp. 251, 254-55 (D. Conn. 1978).

B. Particular Immunities

The only immunity Congress has ever expressly granted and the only immunity courts have ever implied is immunity for particular[218] and discrete[219] transactions and occurrences. The rule in these cases has been articulated as follows: "Repeal is to be regarded as implied only if necessary to make the [regulatory scheme] work and then only to the minimum extent necessary."[220] This principle is plainly an axiom of the irreconcilability ground for implied repeal.

C. Implied Repeal of the Antitrust Laws in the Telephone Terminal Equipment Context

Implied repeal is permissible in only two circumstances: an affirmative showing of legislative intent to repeal the antitrust laws; or irreconcilability of regulatory statutes with antitrust laws.[221]

1. There Was No Legislative Intent To Impliedly Repeal The Antitrust Laws In The Enactment of Telecommunications Regulation.—The legislative history of statutes regulating the telecommunications industry does not contain any affirmative showing of legislative intent to repeal the antitrust laws.[222] Rather, the legislative history evidences a desire on the part of Congress to subject the industry to the antitrust laws in all but the narrowest of regulator-approved instances.[223]

In 1907, the Bell System was securely number one in the telecommunications industry, but its formidable competitors had left it financially weakened.[224] American Telephone & Telegraph (AT&T), under the direction of its President, Theodore Vail, sought regulation as a shield against further competition. In a 1908 Annual Report, Vail wrote,

218. *See* Hughes Tool, 409 U.S. at 385 n.14. *See also* statutes cited *supra* note 17.

219. Silver v. New York Stock Exch., 373 U.S. at 360-61.

220. *Id.*

221. *See* cases collected at note 218 *supra*. Even this is a somewhat expansive reading. *See also* Posadas v. National City Bank, 296 U.S. 497, 503 (1936). Anything more is wholly unwarranted.

222. *See* note 162 *supra* and notes 223-270 and accompanying text *infra*. *Compare Gordon,* notes 109-124 and accompanying text *supra with NASD,* notes 125-149 and accompanying text *supra and Hughes Tool,* notes 18-19 and accompanying text *supra*.

223. Specific exemption is found if the FCC approves the merger of telecommunication carriers. 47 U.S.C. §§ 221(a), 222(c) (1970).

224. In 1907, according to the Census Bureau report, the Bell System had 3,132,000 telephones in service. Independents serviced approximately 2,987,000 exclusive of farmer mutual systems. More competitive Bell policies, the failure of many independents, and the purchase of others by AT&T reversed the situation of a few years earlier and restored Bell's numerical lead. But the battle was far from over and the interim winner was a company *in extremis.* Financially, the battle had left Bell hanging on the ropes. Frequently poor service and heavy-handed competitive tactics resulted in a terrible public image.

See J. BROOKS, TELEPHONE, THE FIRST HUNDRED YEARS 127 (1976).

> It is contended that if there is to be no competition, there should be public control. It is not believed that there is any serious objection to such [public] control [by regulation], provided it is independent, intelligent, considerate, thorough and just, recognizing, as does the Interstate Commerce Commission in its report recently issued, that capital is entitled to its fair return and good management or enterprise to its reward.[225]

Clearly, Vail wanted AT&T to be protected from competition under regulation.[226]

Although regulation of communications common carriers was forthcoming with the Mann-Elkins Act of 1910,[227] there was no concomitant "state protection from aggressive competition," which AT&T sought as a corollary to the regulation to which it had "no serious objection." In 1913, a federal appellate court applied the antitrust laws to an AT&T subsidiary[228] and in July 1913 the Department of Justice Antitrust Division filed suit in the United States District Court for the District of Oregon.[229] The suit sought to set aside certain mergers as violative of the Sherman Antitrust Act.[230] These suits were settled by letter from N. C. Kingsbury, Vice President of AT&T, to Attorney General J. C. McReynolds[231] and by subsequent consent decree.[232] This agreement, called the Kingsbury Commitment, acknowledged AT&T's duty at the time to abide by the antitrust laws. In particular, AT&T promised (1) to dispose of its stock holdings in Western Union, (2) to forego further mergers unless the Department of Justice and the ICC approved, and (3) to allow other telephone companies to interconnect with the Bell System.[233]

The tariff procedures were originally developed in the Interstate Commerce Act to deter discrimination by railroads. These procedures, primarily for filing and publication of rates, were settled by the Mann-Elkins Act of 1910.[234] While Congress simultaneously ad-

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225. T. VAIL, VIEWS ON PUBLIC QUESTIONS 8 (1917). *See also Federal Communications Commission, Investigation of the Telephone Industry in the United States,* H. DOC. No. 340, 76th Cong., 1st Sess. 129, 133 (1939).

226. In his 1910 Annual Report, Vail wrote, "We believe that if there is to be [public] control, there should be protection." T. VAIL, *supra* note 225, at 33. To the same effect is the more elaborate statement of the position set forth in the 1911 Annual Report: "If there is to be state control or regulation, there should also be state protection—protection to a corporation striving to serve the whole community (some part of whose service must necessarily be unprofitable), from aggressive competition which covers only that part which is profitable." *Id.* at 43.

227. Mann-Elkins Act of 1910, Pub. L. No. 218, § 7, 36 Stat. 539, 544-45.

228. United States Tel. Co. v. Central Union Tel. Co., 202 F. 66 (6th Cir.), *cert. denied,* 229 U.S. 620 (1913).

229. 1913 ATT'Y GEN. ANN. REP. 16.

230. *Id.*

231. Letter from N.C. Kingsbury, Vice-President of AT&T, to Attorney General J.C. McReynolds (Dec. 19, 1913) [hereinafter cited as Kingsbury Commitment].

232. United States v. AT&T, 1 Decrees & Judgments in Federal Antitrust Cases 483 (D. Ore. 1914).

233. Kingsbury Commitment, *supra* note 231.

234. The original Interstate Commerce Act established the requirement that rates be just

ded telephone and telegraph companies to the definition of common carriers in the Interstate Commerce Act,[235] the tariff procedures were not applicable to communications companies[236] until the Communications Act of 1934 took effect.[237] In the interim, communications common carriers had a duty to establish just and reasonable charges and to avoid unjust and unreasonable charges.[238] These charges did not have to be filed nor be of public record. By contrast, that is precisely what the Mann-Elkins Act required of rail common carriers.[239]

In 1914, section 11 of the Clayton Act authorized the ICC to enforce certain substantive prohibitions of the Clayton Act.[240] As one contemporaneous authority has pointed out, this reflected Congress' intent to "continue the subjection of the railroads to the antitrust laws,"[241] a subjection the Supreme Court had reaffirmed two years earlier.[242] The Third Circuit noted in *Essential Communications Systems, Inc. v. AT&T,*[243] "A fortiori the less regulated telecommunications companies were not exempt."[244]

The Transportation Act of 1920[245] "substantially increased the already pervasive regulation of the railroad industry by the ICC."[246] The Transportation Act also represented a fundamental change in policy away from competition and toward cooperation in the rail industry.[247] To this end the Transportation Act of 1920 injected the ICC into the daily management of the railroads with direct regula-

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and reasonable. It prohibited preferential and discriminatory rates, required carriers to interconnect, and established basic tariff procedures. Rates were to be published and filed with the Commission. They could not be increased except after ten days notice. No notice was required for rate reductions. Interstate Commerce Act, ch. 104, §§ 1, 2, 3, 6, 24 Stat. 379, 379-81 (1887). *See* SHARFMAN, I THE INTERSTATE COMMERCE COMMISSION 21-22 (1931). The Elkins Act of 1903, 32 Stat. 847, provided incentive to comply with the tariff provisions by establishing the tariff rates as the standard of lawfulness and making noncompliance a misdemeanor for which the corporation itself was liable. *See* I. SHARFMAN, *supra*, at 35-37. The Hepburn Act, 34 Stat. 584 (1906) generally expanded the ICC's jurisdiction, required carriers to file their tariffs on 30 days' notice, and authorized the ICC to prescribe maximum rates for the future. *See* I. SHARFMAN, *supra*, at 42-46. Finally, the Mann-Elkins Act of 1910, 365 Stat. 539, authorized the ICC to suspend rates prior to their effective date.

235. 36 Stat. 539 (1910).

236. Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921); Essential Communications Sys., Inc. v AT&T, 610 F.2d 1114, 1118 (3d Cir. 1979).

237. Communications Act of 1934, § 201, 48 Stat. 1064 (1934). *See also* Mann-Elkins Act, 36 Stat. at 548.

238. Mann-Elkins Act of 1910, § 7, 36 Stat. at 539.

239. 36 Stat. at 548. *Compare* Interstate Commerce Act, ch. 104, § 6, 24 Stat. 379, 380-82 (1887), *as amended by,* Elkins Act, Pub. L. No. 103, 547, 32 Stat. 847 (1903); Hepburn Act, Pub. L. No. 337, 34 Stat. 584 (1906). *See also* Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921).

240. 15 U.S.C. § 21 (1976).

241. I. SHARFMAN, *supra* note 234, at 113.

242. United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912).

243. 610 F.2d 1114 (3d Cir. 1979).

244. *Id.* at 1118.

245. 41 Stat. 456.

246. *Essential*, 610 F.2d at 1118.

247. FCC v. RCA, 346 U.S. 86-92 (1953).

tory authority over managerial policies and operating details.[248] None of these managerial provisions were applicable to communications common carriers. Instead, the Transportation Act "left the control of wire systems practically as it was under the Interstate Commerce Act, prior to federal [wartime] control."[249]

Nor did the enactment of the Willis-Graham Act of 1921[250] alter the nature of communications common carrier regulation. The Willis-Graham Act permitted mergers of operating telephone companies found to be in the public interest by the ICC. This was a very narrow provision[251] and effected no change in the nature of federal regulation of telecommunications common carriers. In fact, it simply modified and codified the procedure already in place under the Kingsbury Commitment.

The Communications Act of 1934 did change the nature of federal regulation of communications common carriers, but not in the fashion in which the Transportation Act changed the nature of federal regulation of rail common carriers. Rather, the Communications Act was to prior regulation of communications more what the Mann-Elkins Act was to prior regulation of railroads. For example, the Mann-Elkins Act required rail common carriers to establish through routes with other common carriers.[252] The concomitant obligation to interconnect in the communications industry was first imposed by regulatory law[253] with the enactment of the Communications Act.[254] Simiarly, the duty to announce rates and practices through filed tariffs, imposed in virtually final form by the Mann-Elkins Act on rail common carriers,[255] was first imposed by

248. *See* I. SHARFMAN, *supra* note 234, at 236. *See also* B. Schwartz, *supra* note 161, at 3.

249. H. REP. NO. 456, 66th Cong., 1st Sess. 11 (1919); *see also* H.R. CONF. REP. NO. 650, 6th Cong., 2d Sess. 61 (1920); *accord*, 610 F.2d at 1118. The only modification was a minor increase in the ICC's enforcement powers with respect to the anti-rebate provision. *See* Transportation Act, Pub. L. No. 152, § 401, 41 Stat. 474, 479 (1920).

250. 42 Stat. 27.

251. It should be noted that the only affirmative showing of any legislative intent to repeal the antitrust laws is in the history of the Willis-Graham Act in the 67th Congress. Since the Willis-Graham Act *expressly* repealed the antitrust laws "under proper circumstances," H. REP. No. 109, 67th Cong., 1st Sess. 2, 2 (1921), one would expect some expressions of congressional intent to attain that end. But a broader exemption from the antitrust laws was not intended. Representative Huddleston opposed the use of the antitrust laws against all monopolies, whether in communications, meat packing, steel, oil, or otherwise. 61 CONG. REC. 1989 (1921) (remarks of Rep. Huddleston). These views were not enacted into law. Moreover, as the Court noted in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 (1976), "Remarks of this kind made in the course of legislative debate or hearing other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight." *Id.* at 203 n.24 (citations omitted).

252. Mann-Elkins Act, Pub. L. No. 218 §§ 1, 4, 36 Stat. 539, 544-48 (1910).

253. Communications Act of 1934, Pub. L. No. 416, § 201, 48 Stat. 1064. As of 1913, AT&T had a duty to interconnect under the Kingsbury Commitment. *See* text accompanying note 231 *supra*.

254. 610 F.2d at 1119.

255. Mann-Elkins Act, Pub. L. No. 218, § 7, 36 Stat. 539, 548 (1910).

the Communications Act on communications common carriers.[256]

While the FCC may have been given some increments of authority beyond those possessed by the ICC over rail common carriers prior to the Transportation Act of 1920, any changes appear to have been virtually *de minimis.*[257] Most importantly, aside from a shortened version of the ICC's authority to regulate capital expenditures of rail common carriers, the Communications Act of 1924 enacted *none* of the managerial powers that the ICC had been given over rail common carriers in the Transportation Act of 1920.[258] As the court in *Essential* clearly articulated, "The [Communications] Act [of 1934] does not impose on the telecommunications industry the kind of comprehensive regulation which, after 1920, the ICC exercised over the railroads."[259]

Moreover, congressional intent in the enactment of the Communications Act seems to have been to affirmatively continue the application of antitrust laws to the telecommunications industry. The question of implied repeal arose in the consideration of whether telegraph common carriers also enjoyed immunity for mergers under the repeal and re-enactment of the Graham Act.[260] Senator Dill, who sponsored the bill that became the Communications Act, replied to the Senate, "No, I should think not. There is no *special statute* permitting it and therefore the antitrust statute probably would apply."[261] Dill's response was not idle dictum. Postal Telegraph

256. Communications Act of 1934, Pub. L. No. 416, § 201, 48 Stat. at 1064. As the court in *Essential* stated, "Many provisions of the 1934 Act were carried forward almost verbatim from the Mann-Elkins Act of 1910." 610 F.2d at 1119.

257. Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921). The committee reported that the new law "left the control of the wire systems practically as it was under the Interstate Commerce Act prior to [war-time] federal control." H. REP. No. 456, 66th Cong., 2d Sess. 11 (1919); H. REP. No. 650, 66th Cong., 3d Sess. 61 (1920). The strengthened authority was insubstantial since it only affected the enforcement powers with respect to the anti-rebate provision. *See* Mann-Elkins Act, § 2, 36 Stat. 539. 544-48, *as amended by* the Transportation Act, § 404, 41 Stat. 474, 479 (1920). This was but an elaboration of the duty to provide service on a just and reasonable basis, without unjust discrimination or undue preference. *See* Sections 1 and 15, *as amended by* 36 Stat. at 544-46, 551-54. Because neither the policies nor the provisions of the Transportation Act applied to communications companies, Congress provided limited relief from the antitrust laws for certain local exchange consolidations. *See* Willis-Graham Act, 42 Stat. 27 (1921) (codified at 47 U.S.C. § 221 (1976)): This relief probably was not necessary under existing law. *See* note 243 *supra.*

258. *Compare* Interstate Commerce Act, §§ 18-22, *as amended by,* 41 Stat. 474, 477-78 (1920), *with* the Communications Act, § 214, 47 U.S.C. § 214 (1976).

259. 610 F.2d at 1120. In addition, the railroads were still subject to antitrust laws after 1920. *See* note 194 *supra. See also* Keogh v. Chicaqo & N.W. Ry. Co., 260 U.S. 156, 161-62 (1922).

260. The issue was whether § 221(a) of the Communications Act, which permitted certain *telephone* mergers, also applied to telegraph companies.

261. 78 CONG. REC. 8823 (1934) (emphasis added). This emphasis is actually first supplied by the Senator himself. In introducing the bill that became the Federal Communications Act, Senator Dill reported to Congress,

> *These gentlemen* [two ICC examiners, a Radio Commission representative, acting chief counsel for the State Department handling communications and the legislative counsel for the Senate] *went over the bill, not once, but again and again, line by line, to*

Company and Western Union wanted to merge in 1937, 1938, 1939, 1940, 1941, and 1942. Nevertheless, though regulated under the same title of the same statute, those telegraph common carriers did not dare to merge until 1943 when Congress enacted section 222(c) of the Communications Act.[262] Nor is the legislative history of that statute silent. The House of Representatives reported to the Senate after considering the bill that became section 222(c), "This affirmative grant of authority to merge is required because of the fact that *the antitrust laws now stand in the way of such consolidations and mergers.*"[263]

Sections 221(a) and 222(c) vividly demonstrate, in the context of the telecommunications industry, Congress' ability and willingness to displace the antitrust laws in a clear and unambiguous manner when that result is desired. Congress' intent was formally expressed in the Communications Act: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[264] Other legislative history of the Communications Act confirms this conclusion.[265]

> *see that it covered so far as possible all the existing law that is in the statutes which we are proposing to repeal, and also to see that it did not seriously conflict.*

Id. at 8822. It seems unlikely that such fundamental national policies as those embodied in the antitrust laws were overlooked.

Section 602 of the Communications Act was entitled "Repeals and Amendments," 78 CONG. REC. 10,984 (1934), and included an express amendment to § 11 of the Clayton Act, giving the FCC jurisdiction to enforce §§ 2, 3, 7, and 8 of the Clayton Act. *Id.* This jurisdiction is not exclusive. United States v. W.T. Grant Co., 345 U.S. 629 (1953); Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934); IT&T v. GT&E, 351 F. Supp. 1153, 1165 (D. Haw. 1972), *aff'd in part,* 518 F.2d 913 (9th Cir. 1975). Section 11(e) of the Clayton Act expressly provides, "No order of the Commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust laws." 15 U.S.C. § 21(e) (1976). This is the only express amendment of the antitrust laws to be found in the Communications Act and the only express immunity for telephone companies to be found is in § 221(a). This provision is inapposite, but the debate is highly pertinent.

262. 47 U.S.C. §222(c) (1976). This section authorizes the FCC to approve mergers of telegraph operating companies. Once so approved, such mergers are expressly immune from antitrust challenge.

263. H.R. REP. No. 69, 78th Cong., 1st Sess. 1 (1943) (emphasis added).

264. 47 U.S.C. § 414 (1976). To the same effect is *id.* § 407 under which the FCC *shares* jurisdiction to enforce tariff violations with federal district courts.

265. While considering § 215 of the original Senate Bill, Congress was very concerned with monopolistic exploitation by the Bell System. Senator Dill reported,

> Charges have been made, and they have been quite free and quite broad, that there is a tremendous spread of profit between the cost to Western Electric of manufacturing the equipment and the prices paid by the operating companies which buy the equipment from Western Electric, the result being not only that there is an enormous profit on the operating equipment but the investment becomes part of the rate base in the various states, upon which the subscribers must pay a sufficient amount to give a return of a reasonable percentage.

78 CONG. REC. 8824 (1934). In its original form, § 215 did regulate contracts between regulated parents and non-regulated subsidiaries, so-called "interservice contracts." AT&T opposed such regulation as an interference with its "free business judgment." *Hearings on S. 2910,* 73rd Cong., 2d Sess. (1934) (Sen. Committee on Interstate Commerce) (testimony of Mr.

In proceedings following the *United States v. Western Electric Co.* consent decree,[266] Congress once again explicitly indicated that the Communications Act did not deprive federal courts of antitrust jurisdiction over the telecommunications industry. After entry of that consent decree, the Antitrust Subcommittee of the House Committee on the Judiciary held hearings on the decree itself and on the circumstances surrounding it.[267] At no point was there a suggestion that the Court lacked jurisdiction. On the contrary, the many criticisms of the settlement procedure clearly demonstrated Congress' view that the case should have been more vigorously pursued.[268] Furthermore, a subsequent report[269] urged that the Department of

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Gifford, President of AT&T). As enacted, this provision only authorized the FCC to study the industry. 47 U.S.C. § 215 (1976). *See also* 78 CONG. REC. at 8824.

Accordingly, the FCC undertook a study of the telephone industry. The report observed, "Supervision over the cost of manufacture of telephone apparatus and equipment is essential to achieve adequate regulation of the Bell System." Federal Communications Commission, *Telephone Investigation* 699 (1938) [hereinafter cited as *Walker Report*). The *Walker Report* observed that there were two methods of regulating or controlling prices of telephone apparatus:

> *First, the establishment of competition* among telephone manufacturers on those items or classes of product which independent telephone manufacturers are able to produce for the use of the Bell System Companies; and *second regulation of the Western Electric Co. as a public utility,* with provision for determination of its valid and reasonable manufacturing costs, including a fair profit, and the concurrent regulation of the rates of operating telephone companies on the basis of such reasonable costs of Western Electric's products existing in their properties.

Walker Report, supra, at 700 (emphasis added). Commissioner Walker then considered both competition and regulation and concluded, "[I]t is recommended that the Communications Act of 1934 be amended so as to permit regulation of the Western Electric Co. by the Federal Communications Commission as a public utility in the manner above described." Walker Report, *supra*, at 702 (emphasis added).

The final report substantially adopted the *Walker Report* but did not request regulatory authority over Western Electric *as a public utility.* Focusing instead on what Commissioner Walker had referred to as the "supervision over the cost of manufacture of telephone apparatus," *Walker Report, supra*, at 699, the final report reasoned in language almost identical to that of *Walker Report,* setting out the twin alternatives of regulation or competition. *See Investigation of the Telephone Industry in the United States, supra* note 225, at 587. The final report concluded, "[I]t is at this time deemed necessary and desirable to recommend the following amendment to the [Communications Act]: *First, specifically to authorize this Commission to prescribe basic cost-accounting methods to be followed by manufacturing companies subsidiary to or affiliated with operating telephone companies through corporate structure." Id.* at 601 (emphasis added).

Congress refused even this limited regulation over the telephone equipment sector of the economy. With the twin alternatives of competition and regulation laid before it by the FCC in a statutorily-ordered investigation, clearly Congress, by its silence, chose competition as the rule of trade for this sector of the economy.

These cost-accounting practices were later imposed on Western Electric, but not by administrative or legislative determination. Rather, cost-accounting measures were agreed to in order to settle antitrust litigation brought by the United States. United States v. Western Elec. Co., 1956 TRADE CAS. (CCH) ¶ 68,246, at 71,139 (D.N.J. 1956).

266. United States v. Western Elec. Co., 1956 TRADE CAS. (CCH) ¶ 68,246 (D.N.J. 1956).

267. Consent Decree Program of the Department of Justice, *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 85th Cong., 2d Sess. 29-120 (1958).

268. *Id.*

269. *Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Dept. of Justice,* H. REP. NO. 27, 86th Cong., 1st Sess. 120 (1959).

Justice investigate and take prompt enforcement action against any violation of the consent decree.

Thus, from 1910 to 1959[270] unbroken legislative history reveals a complete *absence* of congressional intent to impliedly displace the antitrust laws in the telecommunications industry. The Mann-Elkins Act left telecommunications common carriers outside of the exclusive jurisdiction of the Commerce Court. The Willis-Graham Act assumed the general applicability of the antitrust laws and carved a narrow exemption therefrom to ameliorate only the merger prohibitions. The Communications Act assumed that a special statute was required to repeal the antitrust laws, and the one enacted was very narrow. Congress has exhibited a consistent and demonstrated intent to affirmatively *apply* the antitrust laws ever since.

2. *The Statutes Are Reconcilable.*—Since affirmative legislative intent to repeal the antitrust laws is clearly lacking, the issue must be resolved by analyzing whether the Communications Act of 1934 is irreconcilable with antitrust enforcement. When considering whether statutes are irreconcilable, "[i]t is not enough to show that the two statutes produce differing results when applied to the same factual situations, for that no more than states the problem."[271]

By private contract as early as 1899,[272] the Bell System forbade the connection or attachment of anything that was not Bell-supplied to anything that was Bell-supplied. Later, this private contract provision was included by telephone companies in tariffs[273] and became known as the "foreign attachment tariff."[274] These were clearly carrier-initiated tariffs.

270. *See* H.R. J. RES. No. 285, 95th Cong., 1st Sess. (1977), providing that competition is reaffirmed as the best means of serving American consumers' telecommunications needs.

271. Radzanower v. Touche Ross & Co., 426 U.S. at 164. Even the dissent, which would have found an implied repeal, distinguished the case from those involving statutory schemes that are the subject of this article. Justice Stevens noted, "Thus, if Congress intended to . . . limit the coverage of a statute as important as the Sherman Act, a court would require an unambiguous expression of intent to make such a change. . . ." *Id.* at 164.

The Supreme Court has reiterated that courts have a duty to harmonize and reconcile statutes when a conflict arises. Andrus v. Glover Const. Co., 446 U.S. 608 (1980). They are not at liberty to choose which act is to be rendered ineffective. *Id.* at 618. In the absence of clearly expressed congressional intent, each statute should be regarded as effective. *Id.* Clearly when the conflict arises with an antitrust statute, unless there is an unambigious showing of congressional intent, the antitrust statute must be given effect, if possible.

272. This history is reported in Hush-A-Phone, 20 FCC 391, 413 (1955).

273. *See* note 186 *supra.*

274. This tariff is reprinted in the initial consideration of interconnection of answering devices in *In re* Jordaphone Corp., 18 PCC 644, 647 (1954); *see also In re* Carterfone, 13 FCC 2d 420, 421, *reh'g denied*, 14 FCC 2d 571 (1968). Despite inroads on this restriction recounted hereinafter, "such forbidden attachments included plastic covers on phone books (as late as 1975, such a case was taken by the telephone companies to the Supreme Court of North Carolina which overturned a prior state P.U.C. ruling that such a tariff restriction was valid), shoulder rests attached to the receiver, and dial locks to prevent people from calling out from a telephone." Economic Implications of Customer Interconnection, 61 FCC 2d 766, 780 n.3 (1976).

The Bell System's post-*Carterfone* tariffs actually originated prior to the July 28, 1968 *Carterfone* decision.[275] On August 29, 1968, AT&T sent proposed tariff revisions to the FCC with a request for "permission to file."[276] On September 11, 1968, the FCC dismissed the application for permission to file as mooted by the denial of reconsideration in *Carterfone,* and stated that "AT&T *may* file such tariff material, consistent with the Commission's decision in those [*Carterfone*] dockets as it wishes without further Commission order."[277] On September 13, 1968, AT&T submitted revised tariffs without Commission permission, order, or invitation.[278] The carrier-initiated character of these tariffs is evidenced by the FCC's statement allowing them to take effect: "Thus, we will *permit* the tariffs to become effective as scheduled with the understanding that in doing so *we are not giving any specific approval to the revised tariffs.*"[279] In its concluding consideration of the post-*Carterfone* tariffs, the Commission expressly instructed, "*Our action is not to be construed as approval of the post-Carterfone tariffs* and they remain subject to such further action as the Commission may wish to take with respect thereto."[280]

Significantly, one year later the Commission emphatically repeated that its actions were not to be considered approval of the tariffs.[281] It is clear that the FCC never intended to formulate a registration program. Furthermore, the Commission's actions clearly express its intention to give priority to the policy of ensuring non-restrictive interconnection rather than protecting telephone companies from undemonstrated harm. In fact, the connecting arrangement was never consistently required.

The FCC in *Carterfone* unquestionably put first the policy of not restricting interconnection, ahead of undemonstrated claims of harm to the network. Restrictions on interconnection were to be permitted only *after* harm to the network had been demonstrated with respect to an item or class of customer-provided equipment.[282] The

275. *See* Letter from Ben S. Gilmer, President of AT&T, to Rosel Hyde, Chairman, FCC (July 29, 1968).

276. Letter to D. Emerson, Vice-President of AT&T, to Ben F. Waple, Secretary, FCC. No such permission is ordinarily sought or required. *See generally* MCI Telecommunications Corp. v. F.C.C., 651 F.2d 365, 374-77 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978); AT&T v. FCC, 487 F.2d 865, 876-81 (2d Cir. 1973).

277. FCC Order 68-925 (Sept. 11, 1968).

278. Transmittal Letter No. 103-240, dated September 13, 1968, from W.N. Albert, Administrator of Rates and Tariffs, AT&T, to the Secretary of the FCC clearly states that AT&T filed revised tariffs wholly without Commission involvement.

279. Foreign Attachment Tariff Revisions, 15 FCC 305, 610 (1968) (emphasis added).

280. *Id.* at 611.

281. Foreign Attachment Tariff Revisions, 18 FCC 871, 874 (1969).

282. The *Carterfone* Decision placed the burden of proof squarely upon the carriers—not the users or this Commission—to demonstrate that a particular unit or class of customer-provided equipment would cause either technical or economic harm to

information accompanying Bell's post-*Carterfone* tariffs failed to show that any device would cause harm unless interconnected through a carrier-supplied connecting arrangement.[283] The FCC later noted that Bell did not even argue "that this protection [the connecting-arrangement tariff proposal] was the minimum protection required or the most cost effective."[284]

The connecting-arrangement tariff clearly never effectuated Commission policy.[285] Bell's so-called "tariff" cannot realistically be considered separately from Bell's enforcement and implementation of that tariff. Bell's activities allegedly included intentional and unreasonable delay in the provision of connecting arrangements, provision of only defective connecting arrangements, improper installation of connecting arrangements provided, and, finally, refusal to provide effective repair service.[286] Surely the FCC never approved these activities in any sense.[287]

Furthermore, the connecting arrangement requirement was not "an interim means of protecting the network."[288] If customer-provided equipment was a danger to the network, it was equally threatening when provided by private-line subscribers or by subscribers of independent telephone companies. Nonetheless, the Bell System did not apply the connecting arrangement tariff to private-line customers until five years after *Carterfone* and has never applied the connecting arrangement requirement to subscribers of independent telephone companies. The FCC has noted that there has been no harm to the network from these inconsistencies in AT&T's policy.[289]

Moreover, the Commission never intended to formulate its own registration program. Rather, as Chairman Wiley stated for himself and four other commissioners in the Memorandum and Opinion in *Interstate & Foreign MTS & WATS,*[290] The "necessity of a terminal

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> the telephone network . . . ; this burden was to be met *prior* to the filing of a tariff restricting the use of such equipment.

Interstate & Foreign MTS & WATS, 56 FCC 2d 593, 596 (1975).

283. *Id.*

284. *Id.*

285. The FCC declared these practices unlawful. Interstate & Foreign MTS & WATS, 56 FCC 2d 593 (1975).

286. *See, e.g.,* Bell Tel. Co. of Pa. v. FCC, 503 F.2d 1250, 1256 (3d Cir. 1974); Plaintiff's Responses to Defendants' First Set of Interrogatories in United States v. AT&T, C.A. No. 74-1968 (D.D.C.) at 42, 43, 73, 76, 77, 78-82, 84, 87, 88, 92-94, 114, 150, 212, 219, 223, 240, 287, 289-291, 294. *See also* Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 94 (2d Cir. 1981); Phonetele, Inc. v. American Tel. & Tel, 664 F.2d 716, 721 nn. 5-6 (9th Cir. 1981). This activity occurred during one of Bell's worst periods. Recently, the situation has substantially improved due to changes in top management.

287. *See* United States v. AT&T, 1978-2 TRADE CAS. (CCH) ¶¶ 75,551-75,532. None of this conduct was ever described in any tariff or filing.

288. Essential Communications Sys., Inc. v. AT&T, 446 F. Supp. 1090, 1102 (D.N.J. 1978), *rev'd,* 610 F.2d 1114 (3d Cir. 1979).

289. Interstate & Foreign MTS & WATS, 56 FCC 2d 593, 598 (1975).

290. 57 FCC 2d 1216 (1976).

interconnection program under FCC auspices is *directly attributable to the carrier's failure to develop standards* and procedures which would provide adequate protection against any harms to the switched telephone network from customer-supplied terminals."[291] Chairman Wiley continuously hoped that the carriers would voluntarily develop their own minimum standards.[292] Unfortunately, the carriers voluntarily refused.

Fourteen years before *Carterfone*, in *In re Jordaphone Corp.*,[293] the FCC determined that properly interconnected answering devices did not pose any threat of harm to the operating telephone network.[294] The *Jordaphone* Commission thus found the foreign at-

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291. *Id.* at 1229-30. Chairman Wiley further stated "My hope and expectation is that an industry consensus can *yet* be reached which will permit 'a withering away' or elimination of this regulatory program." *Id.* (emphasis added).

292. In this regard, the course of the Registration Program's standards is enlightening. The plaintiff in United States v. AT&T, 427 F. Supp. 57 (D.D.C. 1976) recounted this history in its Answers to Defendant's First Set of Interrogatories:

> When the FCC was attempting to ascertain the technical standards which customer-provided equipment should be required to meet in order to protect the network against harm and degradation of service, defendants proposed standards of manufacture and performance. These standards were demanding and rigid, and AT&T explained that they were the minimal standards acceptable to safeguard the network. The time consumed in the evolution of these standards, and their rigidity and detail, obstructed the efforts of interconnect manufacturers and suppliers to compete with defendants in the telecommunications terminal equipment market because the existing connecting arrangement requirements remained in effect during the pendency of the Docket.
>
> In November of 1975, the FCC announced that all terminal equipment to be attached to the network after the effective date of the certification program would have to meet the standards developed, *including equipment manufactured and supplied by defendant Western Electric. Almost immediately AT&T began to argue for relaxation of the standards, claiming that they were "too tough" and would require the expenditure of $200 million in retrofitting before Western Electric equipment could meet them.* Accordingly, plaintiff contends that defendants misrepresented to the FCC both the dangers involved in permitting the interconnection of customer-provided equipment and the manufacturing and performance standards required to guard against those dangers. Plaintiff believes that these representations were made for a number of reasons. First, the standards proposed would be too demanding for interconnect manufacturers to meet. Second, attempts by the interconnect industry to meet the standards would take time and increase the price of their products, thereby delaying interconnect competition and diminishing its economic attractiveness to potential customers. Finally, defendant believed that its own equipment would be exempt from the requirements, and therefore favored by customers. When defendants discovered that the standards which they proposed for application to others were to be applied to their own offerings they were forced to admit that their own equipment was incapable of satisfying the standards which they had proposed. Defendants subsequently advocated the adoption of substantially relaxed standards which their equipment was capable of satisfying.

Id. at 240-41. (emphasis added). *See also* Interstate & Foreign MTS & WATS, 58 FCC 2d 736, 741 (1976).

293. 18 FCC 644 (1954).

294. There is no sound reason, however, why these devices cannot be used at installations where they will function properly and where local authorities have determined that a local need for them exists. The record reflects no substantial impairment of the interstate and foreign toll telephone service or of the intrastate and local service of the Wisconsin Telephone Company as a result of the action of the Public Service Commission of Wisconsin requiring the Wisconsin Telephone Company to permit subscribers to continue to use the Electronic Secretary.

Id. at 671.

tachment provisions of the telephone company tariffs to be "unjust, unreasonable and therefore, unlawful to the extent that they may be interpreted to prohibit the installation and use by the subscriber, of a telephone answering device not furnished by the telephone company. . . ."[295] Bell's conduct forced the FCC to repeat this holding fourteen years later when a public need and demand was finally shown.[296]

Bell claimed that it could not comprehend the *Carterfone* policy and that it placed the entire Bell System on the horns of a dilemma.[297] This contention is belied by the evidence,[298] but a misconception by a regulated entity is no grounds to repeal an act of Congress.[299] It is not reasonable to believe that Bell thought it was "opening the network to the widest possible constructive use" by *not* providing the very connecting arrangements Bell had promised to provide, or by delaying the provision of those connecting arrangements, or by providing only connecting arrangements that did not properly connect, or by substantially refusing effective repair service to connecting arrangements. It is difficult to understand how Bell thought that establishing the blatant discrimination involved in the connecting arrangement tariff would "open the network." Overall, it does not seem possible that Bell actually thought its conduct accorded with even its own understanding of the *Carterfone* policy.[300] In any event, Bell's understanding of *Carterfone* would not support its claim of antitrust immunity.[301]

Moreover, Bell had network standards that could have been used to distinguish harmless from harmful devices. Indeed, the FCC

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295. No public need or demand was found in *Jordaphone. Id.* at 671. This explains the limited nature of *Jordaphone's* holding.

296. *Carterfone,* 13 FCC 2d 420, *reh'g denied*, 14 FCC 2d 571 (1968).

297. Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716, 732 (9th Cir. 1981).

298. Only one day after *Carterfone,* Bell's president described the new policy quite well: "to open the network to the widest possible constructive use." *See* Gilmer Letter, *supra* note 275.

299. Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716, 745 (9th Cir. 1981).

300. The totality of this conduct is not contained in any tariff. Yet, as the court pointed out,

> Even if it be assumed, *arguendo,* that the Commission exercised explicit regulatory authority over only some segments of the activities challenged in the complaint, it does not follow that defendants are immune from antitrust liability even with respect to them. Defendants' purpose is alleged to be the monopolization of the telecommunications service and equipment market, and the bulk of their conduct, including that revolving around Western Electric and Bell Labs, cannot under any reasonable view be regarded as immune from antitrust enforcement by virtue of regulation. In that circumstance, the remainder of the challenged conduct is likewise subject to antitrust consideration, both because it constitutes a means for achieving an unlawful end (California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 515 (1972)), and because it represents one facet of a larger monopolistic scheme. *See* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 212, 222 (1966); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 316 (1973).

United States v. AT&T, 461 F. Supp. 1314, 1328-29 (D.D.C. 1978).

301. *See* Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716 (9th Cir. 1981).

indicated both in the *Carterfone* decision[302] and on reconsideration that it welcomed the establishment and enforcement of standards for interconnection.[303] Seven years later, because of Bell's continuous delaying, the FCC prescribed the standards it originally thought were in the public interest. In large part, these FCC standards were taken from Bell's network standards. Therefore, standards that were available to Bell in 1968 finally became mandatory in 1975 due to FCC prescription.

Thus, it is clear that antitrust enforcement is reconcilable with the carrier's obligations under the regulatory act.[304] The statutes in-

302. In *Carterfone,* the FCC noted, "[T]he carriers may submit new tariffs which will protect the telephone system against harmful devices, and *may specify technical* standards if they wish.'. 14 FCC 2d at 572 n.2 (emphasis added). Even in allowing the post-*Carterfone* tariffs to take effect at all, the FCC initiated an informal proceeding. Expressly made a subject of this inquiry was "consideration of what changes, if any, should be made in the *technical criteria* and other conditions for interconnection. . . ." Foreign Attachment Tariff Revisions, 15 FCC 2d 610, 611 (1968). The end result of this proceeding was to declare the post-*Carterfone* tariffs unreasonable and unlawful and to establish the Registration Program. Interstate & Foreign MTS & WATS, 56 FCC 2d 593 (1975).

303. We found no substantial factors outweighing the necessity of eliminating the arbitrary tariff. *Standards to prevent the introduction of harmful inputs can be devised* (Tr. 626-627; see also par. 2.6.9. of tariff No. 263 containing a general prohibition against harmful attachments, and tariff No. 260, par. 2.1.4.(D)), *and enforcing them would be no more difficult than enforcing the present absolute prohibition. . . . The record also showed that terminal devices may be used under a standard making actual harm a factor. . . .*

Carterfone, 14 FCC 2d 570, 572 n.2 (emphasis added). "We did not prescribe the terms of a new tariff, but left that to the initiative of the telephone companies, pointing out that they were in no wise precluded from adopting *reasonable* standards to prevent harmful interconnection." *Id.* at 572 (emphasis added).

304. It is clear that antitrust enforcement is not irreconcilable with the carrier's obligations under the regulatory act. FCC Chairman Richard Wiley, for himself and four other commissioners, described the FCC's role in this situation as follows: "The Commission is confronted here with the difficult task of assuring that the benefits of *full and fair competition* will flow to the public, while minimizing to the greatest extent possible the intrusion of bureaucracy into the marketplace." Interstate & Foreign MTS & WATS, 57 FCC 2d 1216, 1229 (1976) (emphasis added). The cause of FCC intervention was pointedly stated: "The necessity of a terminal interconnection program under FCC auspices is *directly* attributable to the carrier's *failure to develop standards* and procedures which would provide adequate protection against any harms to the switched telephone network from customer-supplied terminals." *Id.* at 1229 (emphasis added). More recently, in an investigation into charges for interstate telephone service, after noting the narrow and indirect nature of its regulatory authority over Western Electric, *see* AT&T, Changes For Interstate Tel. Service, 64 FCC 2d 1 (1977), which comes about solely as a result of the FCC's authority over interstate service rates, the FCC held, "Moreover, upon considering this record as a whole, and being particularly mindful of the substantial benefits to ratepayers resulting from equipment competition, we think the best of all the measures presented on this record pertaining to Western's efficiency is competition." *Id.* at 23 (emphasis added) (footnotes omitted).

In Satellite Business Systems, 62 FCC 2d 774 (1977), the FCC concluded, "Thus, our regulatees are subject to *complementary* regulation under both the Communications Act and the antitrust laws," since the full and fair competition doctrine is fully applicable in this area. Interstate & Foreign MTS & WATS, 57 FCC 2d at 1229. Similarly, the Commission held in AT&T (Dataphone) 62 FCC 2d 774 (1977), "[W]e hope to make the 'full and fair competition' obligation of the carriers consistent with similar obligations imposed pursuant to the antitrust laws." *Id.* at 798. Finally, the FCC unmistakably advised the district court in *United States I,* "The Commission has never considered its authority over equipment interconnection to displace the antitrust laws." *See, e.g.,* Amicus Brief of FCC at 18, United States v. AT&T, 424 F. Supp. 57 (D.D.C. 1976). However, the connecting arrangement tariff itself has been inconsistently applied. Before *Carterfone,* AT&T adamantly opposed interconnection with foreign volved in the regulation of the telecommunications industry and the antitrust laws do not produce differing results when applied to the same factual situation.[305] Where the results are the same, the statutes, a fortiori and in fact, are reconcilable.

AT&T has consistently argued[306] that it has an affirmative obligation under the Communications Act to protect the network from harm.[307] The duty is self-appointed. No such obligation is imposed by any section of the Act or by any FCC decision.[308] Rather, the Act requires AT&T to provide telecommunications services "*on request*" without unjust, unreasonable, or discriminatory restrictions or practices.[309] Telephone equipment *may* be provided by AT&T, but AT&T is not required to "furnish a terminal of any kind as part of any communications service."[310]

VII. A Brief Policy Analysis

A policy analysis suggests a finding that the antitrust and regulatory statutes are reconcilable.[311] First, the FCC's policies favoring

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equipment. The *Carterfone* decision then struck AT&T's extant tariffs. AT&T promptly replaced the illegal tariffs with the post-*Carterfone* tariffs that purported to allow interconnection through a connecting arrangement.

The carrier-supplied connecting arrangement tariff works an obvious economic discrimination since only those subscribers providing their own equipment must pay; those subscribers provided even identical Bell-supplied equipment were not required to make this payment. Moreover, the carrier-supplied connecting arrangement requirement did not apply when an independent telephone company's subscriber used customer-supplied equipment and was not applied even by Bell to private line customers who provided their own equipment until five years later. There was no technical justification for this discrimination and the intervening five years produced no evidence of technical harms by customer-provided equipment used on either service. *See* Interstate & Foreign MTS & WATS, 56 FCC 2d 593, 598 (1975):

305. Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1975).

306. AT&T has strenuously resisted interconnection on the ground that it has a duty to protect the network. In Implications of the Telephone Industry's Primary Instrument Concept, 68 FCC 2d 1157, 1163 (1978), the FCC held that there is no such obligation under the Communications Act in the following language:

> That the carriers have traditionally furnished the telephones with the service does not establish that they are required to do so or warrant any inferences about the public interest. While the definitions contained in Sections 3(a), (b) or (r) of the Communications Act are sufficiently broad to permit the inclusion of terminal equipment in interstate communication by wire or radio and in the telephone exchange service, these definitions do not require that the provision of terminals be a common carrier service. . . . Nor does the Act contain any requirement that the carrier furnish a terminal of any kind as part of any communication service. Indeed, the carrier's duty under Section 201(a) is to furnish service "upon reasonable request"; nowhere in the Act does the carrier have any right to furnish service or equipment that the customer does not request or want. . . .[T]o read into the Act any requirement for carrier terminal offeringe as part of complete service is not justified by the statutory language and would fly in the face of the *Carterfone* principle.

307. This has been referred to as an "end-to-end service responsibility." *Id.* at 1164.

308. *See* Implications of the Telephone Industry's Primary Instrument Concept, 68 FCC 2d 1157, 1163 (1978). *See also* Second Report and Order, 58 FCC 2d at 741-42 (1976).

309. 47 U.S.C. §§ 201(b), 202(a) (1970) (emphasis added).

310. AT&T on behalf of Mebane Home Telephone Co., 53 FCC 2d 473, 478 (1975), *aff'd sub nom.* Mebane Home Telephone Co., FCC, 535 F.2d 1124 (D.C. Cir. 1976). *See* note 236 *supra*.

311. Since its inception, the Sherman Act, 15 U.S.C. §§ 1-7 (1976)—the very embodiment

competition in the interconnect market and the national policy of the Sherman Act favoring competition would be retarded by holding AT&T immune from antitrust laws. Moreover, these policies would be advanced by holding AT&T subject to antitrust laws. Second, parties injured by AT&T's anti-competitive activities would be without remedy if the antitrust laws were inapplicable.[312] The temptation to engage in anti-competitive practices would be aggravated by holding AT&T immune. Third, immunity would subject AT&T's unregulated activities[313] to no law. AT&T could act without re-

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of a preference for spirited competition—has been a virtual economic charter for our national economy. *See* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966); Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114, 1117 (3d Cir. 1979). Former Antitrust Section Chief Donald Turner pertinently noted,

> *It is of critical importance that the monopoly be confined to [the] minimum area necessary for realizing available economies of scale; that competitive pressures be preserved* at every level where they might be exerted; and that, in general, conditions which might induce performance similar to what might be expected in a setting of workable competition be preserved or created. . . .
>
> [E]ven where transmission exhibits strong economies of scale, and where in consequence monopoly must be accepted, *it does not necessarily follow—indeed, it almost certainly does not follow—that the transmission entity should also be authorized to furnish customer equipment on a monopoly—or perhaps any—basis.*
>
> Extending the point just made—a monopolist should not be permitted to lever his way into competitive markets. If a carrier desires, for example, to obtain a manufacturing capability either by merger or internal expansion, I would be strongly inclined, in general, to block his path. However effective direct regulation can be made, it cannot be expected to create the same incentives to progressive and efficient operation that competition would. Indeed it may as a side effect, loosen cost constraints and encourage rate-base expansion. Hence, it is extremely *important that competition be maintained wherever possible, so that at some level in the industry competitive incentives are operative.*

Turner, *The Role of Antitrust Policy in the Communication Industry,* 13 ANTITRUST BULL. 873, 877-79 (1968) (emphasis added).

312. The FCC lacks antitrust remedies. The FCC can require a refund of unlawful rates after a hearing. 47 U.S.C. §§ 204, 205 (1976). But these remedies provide no relief to a competitor who alleges that rates are so low as to be predatory or that practices are unfairly anticompetitive. The Act simply contains no provision for redressing such a wrong, even if the FCC after hearing finds that the allegations are correct. *See* Nader v. FCC, 520 F.2d 182, 203 n.22 (D.C. Cir. 1975).

313. Western Electric is unregulated. The FCC has always disavowed direct regulatory control over Western Electric. *See* FCC, *Report on the Investigation of the Telephone Industry in the United States,* H.R. Doc. No. 340, 76th Cong., 1st Sess. (1939); Letter of November 30, 1955, from Chairman of the FCC to Attorney General Brownell in *Hearings before the Antitrust Subcom. of the House Committee of the Judiciary,* 85th Cong., 2d Sess., Part II, Vol. II at 2233-2234 (1958); *id.* at Vol. III, 3446, 3543 (1959) (testimony of the Chief of the Telephone Division, FCC); *Hearings before the Subcom. on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 87th Cong., 2d Sess. 281, 283 (1962) (testimony of Chairman Minow, FCC). The FCC has also maintained that it has no direct control over the distribution of telephone equipment. For example, the FCC's sole contact with the telephone terminal equipment market and the unregulated Western Electric—the subsidiary participating directly in that market—is by reason of the FCC's regulation of interstate service rates. AT&T, Charges for Interstate Tel. Service, 64 FCC 2d 1 (1977). "The Communications Act gives us no explicit or direct regulatory responsibility over the non-operating activities and affiliates of the Bell System." *Id.* at 13 n.21.

> At the beginning of his discussion, the ALJ quotes the Trial Staff's statements to the effect that Western's earnings for Bell System business are subject to a kind of 'indirect' regulatory constraint, since Western's prices become the Bell System's costs and rate base; and compared with the regulation of the Bell System such "indirect" regulation of Western has necessarily been "narrowly" limited essentially to review of Western's earnings level. Bell claims in its exceptions that regulation of Western has

straint in these areas.[314] Finally, competition in the telecommunications market will promote innovation, better products, lower prices, better service, and innumerable other benefits and choices for consumers and prospective entrepreneurs.[315] The Supreme Court has summarized these policy considerations most precisely:

> [A]ll economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation.

> not been "narrow" citing several state public utility decisions. We believe the ALJ and Trial Staff correctly describe the scope of regulation of Western. As noted above, we have no *direct* regulatory responsibility for the non-operating affiliates. In this same footnote, Bell excepts to the ALJ's characterization of Western as a "monopolist" of the Bell System equipment needs. We find the ALJ's characterization is borne out by this record. . .

Id. at 20 n.31 (emphasis in original) (citations omitted). *See* IT&T v. GT&E, 449 F. Supp. 1158, 1169, 1183 (D. Hawaii 1978). "The Commission does not directly regulate the manufacture and supply of telephone equipment or terminal devices used in connection with the telephone system." FCC Amicus Brief at 16, United States v. AT&T, 427 F. Supp. 57 (D.D.C. 1976) (footnote omitted).

314. The FCC does not directly regulate the manufacture and supply of equipment or devices used in interconnection with the phone system. *See* note 313 *supra*. The Commission does have authority under Title III to require that television sets have all-channel reception capabilities, 47 U.S.C. § 303(S) (1976), and to regulate radio transmission devices that might cause interference, 47 U.S.C. § 302(a) (1976). This authority does not extend to telephones however. The Commission's new registration program for telephone terminal devices is based upon the authority under Title II to require carriers to permit reasonable use of the telephone if it will not harm the system. *See* Interstate & Foreign MTS & WATS, 56 FCC 2d 593 (1975).

AT&T has consistently opposed any regulation of Western Electric. Essential Communication Sys. v. AT&T, 610 F.2d 1114 (3d Cir. 1979). AT&T claims, however, that antitrust immunity is proper for Western Electric because "the specific conduct involved in the case has been committed to regulatory 'control.'" *Id.* There is no explanation of how the *un*regulated activities of the *un*regulated Western Electric were "committed" to such regulatory control.

The FCC has correctly taken the position that its regulatees are subject to antitrust enforcement. *See* AT&T, Charges for Interstate Service, 64 FCC 2d 1 (1977). In Satellite Bus. Sys., 62 FCC 2d 997 (1977), the FCC stated, "Thus, our regulatees are subject to complementary regulation under both the Communications Act and the antitrust laws." *Id.* at 1071. *See also* AT&T (Dataphone), 62 FCC 2d 774 (1977), wherein the FCC stated, "[W]e hope to make the 'full and fair competition' obligations of the carrier consistent with similar obligations imposed pursuant to the antitrust laws..' *Id.* at 798 (citation omitted).

Generally, Western Electric is alleged to be a co-conspirator. Plaintiffs usually claim that Western Electric manufactured the malfunctioning connecting arrangements, unduly delayed manufacturing connecting arrangements, and supplied inadequate installation guides and instructions. The Supreme Court has plainly and recently held, "[A]n exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979). The purpose of the illegal conduct in *Royal Drug* was at least laudable. Health insurance carriers employed a group boycott on behalf of their subscribers to promote lower prices on drugs; but the boycott harmed drug companies that refused to give the subscribers the preferred treatment. The Supreme Court held the action to be an illegal group boycott despite the insurance carrier's contention that the activity was exempt from antitrust action since it was regulated by various state insurance agencies and exempt under the McCarren-Ferguson Act, 15 U.S.C. §§ 1012, 1013(b) (1970).

Western would seem to be such a "non-exempt party." Without recourse to the antitrust laws for Western's monopolistic practices, it would be beyond the law and its victims would be unable to obtain compensation for wrongs suffered.

315. Economic Implications of Customer Interconnection, 61 FCC 2d 767, 687-681 (1976). *Accord,* National Soc'y of Professional Eng'rs. v. United States, 435 U.S. 679, 695 (1978). For an interesting article on the explosion of innovation and competition since *Carterfone* in the interconnection equipment market see Burck, *Getting to Know the Smart Phone,* FORTUNE 134 (Feb. 25, 1980).

There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.[316]

VIII. Conclusion

The applicability of antitrust laws to regulated industries is solely a matter of legislative intent. Most often, the express intentions of Congress are embodied in antitrust laws and in statutes expressly repealing antitrust laws. Congress may not always be explicit, however, and the question of implied antitrust immunity then may arise. The United States Supreme Court has stated that the implied repeal of one statute by a later statute occurs only when there is an affirmative showing of a legislative intent to repeal or when the two statutes are irreconcilable. Irreconcilability is not proved, however, simply by showing that the two statutes produce differing results when applied to the same factual situations. Nevertheless, it does seem clear that if there is no express legislative intent to repeal and the statutes do not produce differing results, implied repeal of the antitrust laws is impermissible.

Application of the above analysis to the telecommunications industry reveals that implied antitrust immunity for telephone companies is generally inappropriate. No affirmative legislative intent to displace the antitrust laws exists in the legislative history of telecommunication regulation. Nor are the antitrust laws and the regulations under the Communications Act of 1934 irreconcilable in regard to telephone terminal equipment. Hence, implied repeal of the antitrust laws for telephone companies, in this instance, is simply a "wrong number."

316. Cantor v. Detroit Edison Co., 428 U.S. 579, 595-96 (1976) (emphasis added).